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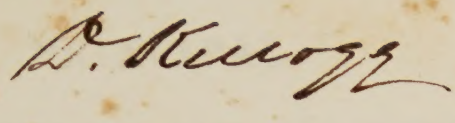

THE

PRINCIPAL

GROUNDS AND MAXIMS

WITH

AN ANALYSIS

OF THE

LAWS OF ENGLAND.

By WILLIAM NOY, Esquire;

FORMERLY OF LINCOLN'S INN,

Attorney-General, and of the Privy Council to King Charles I.

Lex plus laudatur, quando ratione probatur.

THIRD AMERICAN,

FROM THE NINTH LONDON EDITION,

With References to Modern Authorities, both British and American.

BY WILLIAM WALLER HENING,

COUNSELLOR AT LAW,

Author of the Virginia Justice; the Lawyer's Guide, &c.; and Editor of the Statutes at Large of Virginia.

BURLINGTON, VT.

CHAUNCEY GOODRICH.

1845.

PREFACE

TO THE SECOND AMERICAN EDITION.

Noy's Maxims have been more variously represented by readers, and more rudely treated by editors, than any book, perhaps, which ever issued from the press. While some are in the constant habit of citing it, and even the celebrated lord *Mansfield*, has said that, "*Noy's Maxims is cited in the courts, as a book of authority:*"* others affect to consider it as of no authority. But the frequent references made to it, in books of acknowledged merit, in England, and the fact that it has passed through *nine* editions in that country, and *one* in the United States, is conclusive proof of the estimation in which it is generally held.

The first edition was a translation from the Law French, made after the author's decease, and published in 1641.* It consisted of the *Maxims*, with a few *illustrations* to each; rarely citing any authority. In the *fifth* edition, very considerable additions were made, distinguished by this mark †. These were "*materially altered*," many of them "*transposed*," some of them "*new-modelled*," and some "*expunged*" by the editor of the *sixth* edition, whose labours were thus distinguished (*). The editor of the *ninth* edition has taken equal liberties with the *matter*, and much greater with the LITERARY CHARACTER of his predecessors, whom he represents as having "*shamefully continued*," and suffered to pass unnoticed, "*defects which must have been apparent to the most superficial observer.*" He has also restored many illustrations of the maxims, to be found in the fifth edition, which were expunged by the editor of the sixth, and has omitted *all those*

* See Clarke's Bibliotheca Legum, or Law Catalogue, p. 230, 277.

introduced by the editor of the sixth edition, though most of them were very apposite.

In the present edition, the editor has availed himself of the labours of all those who have gone before him, in this work, — and has arranged the matter according to his own best judgment. He has introduced into the text, and in the notes, a variety of articles, first inserted in the *sixth* edition, but which were omitted in the *ninth*, and are thus distinguished (*), and he has restored to their original position others, which he conceives had been improperly transposed. Thus, under the *first* maxim, which inculcates the importance of religion, in a government, and the consequent necessity of keeping the *Lord's Day* holy, were inserted an abstract of those statutes which imposed certain penalties for the profanation of the Sabbath, by noisy and indecent sports or secular employments. These were transferred to the *second* maxim, by the editor of the *ninth* edition, under which maxim the illegality of *judicial* proceedings, on a Sunday, was alone contemplated. Not being able to perceive the propriety of this transposition, the editor has restored the subject matter to the place which it held in the sixth edition.

The text of the *ninth* edition has been adopted, in this, as being far more correct than any of the preceding: Indeed, many parts of the former editions were perfectly unintelligible. — Some of the notes of the *ninth* edition, which are very valuable, are inserted entire; others altered to suit the political institutions, and laws of the United States; and others, which related exclusively to the civil and ecclesiastical polity of England, have been expunged. In the translation of the Latin maxims, he has generally adopted that of the editor of the *ninth* edition; which if not the most *elegant*, is certainly the most *faithful*. Every *scholar* knows, that many of the Latin maxims will not admit of translation, either *free* or *literal*, without losing

much of their *point*. Hence, to the generality of readers, the most *faithful* translation is the best.

Since the publication of the first edition, which was comprised in 113 pages quarto, there have been added, *An Analysis of the Laws of England; a Treatise of Particular Estates, by Sir John Doderidge, Knt.; and Observations on a Deed of feoffment, by T. H. Gent.* The original Maxims of Noy were *loaded* with this extraneous matter, in the succeeding editions; and, to add to the *bulk*, the editor of the ninth edition, perceiving that the Treatise of Particular Estates had been improperly ascribed to Sir John Doderidge, and "that it was only an incorrect transposition, from pages 67 to 78 of Noy's Treatise of Tenures," has inserted *Noy's Tenures* entire, at the end of the book, and has not repeated that tract as a separate treatise. As the subjects, embraced by these *tracts* are much more ably discussed by subsequent writers of *undoubted authority*, and the propriety of swelling a book by the addition of *distinct treatises* is not generally acknowledged; *they* are entirely omitted in this edition.

The matter introduced by the editor of the *fifth* edition is thus distinguished †; that, by the editor of the *sixth* edition, thus *; and the additions made by the present editor are included within crotchets, thus []; though in some instances, he may have omitted it.

WILLIAM WALLER HENING.

Richmond, February 26th, 1824.

PREFACE

TO THE NINTH EDITION.

(By W. M. Bythewood, Esq. of Lincoln's-Inn.)

Noy's Maxims were originally written in Law French, and the first Edition of them was a translation, made after the Author's decease, by a person who was neither well acquainted with the language of the work, nor understood the subjects of which it treated. The mistakes of the Translator were innumerable, the phraseology confused, and the meaning frequently very difficult to be ascertained. Though these defects must have been apparent to the most superficial observer, they were shamefully continued, and remained unnoticed by all the subsequent Editors. *(a)* However, the intrinsic merit of the work was so great, and being so frequently cited as authority in the Abridgments, Digests, and Treatises of our most celebrated Authors, it has always made a part of every Lawyer's Library.

In the former Editions, a Treatise of particular Estates, said to have been written by Sir John Doderidge, was added; but it appears astonishing that all the former Editors could have overlooked the circumstance, that it was only an incorrect transposition, from pages 67 to 78 of Noy's Treatise of Tenures, which was evidently composed by the same person, who wrote the other part of that valuable work, and without which it would have been incomplete. No one would have the temerity to charge a man of Noy's acknowledged superior legal attainments with being a plagiarist. The editors also permitted the

(a) See Watkin's Principles of Conveyancing, xxii. 2d ed.

Tract to be called a Treatise of *particular* Estates, because that was the title of the first short section, though the remainder of it treats of "Possession, Reversion, Remainder, and Rights," which the most careless student, in the infancy of his inquiries, would not term "*Particular* Estates."

No pains have been spared in correcting the errors of the former impressions; the additions of the Editor of the Fifth Edition of the Maxims, marked †, have been generally retained, though they are sometimes transposed; the translation of the Latin Maxims, where correct, has been preserved, and when incorrect, amended; the Latin and Law French in the Maxims have been translated; Notes have been added occasionally; and references frequently made to the Statutes, Reports, Abridgments, Digests, and Treatises of established Merit, with a view of directing the student's attention to works calculated to assist him, and to supply, in some measure, the deficiency occasioned by the author having rarely cited any authority.

Both in the Maxims, and in the Tenures, occasionally, where the Text was not clear, or there was an evident omission, a few words have been inserted to render the sense complete; and in the whole collection the orthography has been modernized.

* * * * * * * * * *

In the first five Editions of the Maxims, the Chapter on Leases was numbered xxxiv, and the next Chapter on Surrenders, by mistake, numbered xxxvi, and which, although incorrect, is retained in this Edition, because the work is frequently cited by the number of the Chapter: and in all the works the former paging is retained in the margin.

* * * * * * * * * *

4, Gray's Inn Square,
14*th April*, 1821.

ADVERTISEMENT

TO THE SIXTH EDITION.

(By Charles Barton, *of the Inner Temple, Esq.)*

The eminent reputation which the Maxims of Noy have maintained, from so early a period as the reign of Charles II. to the present time, has rendered their merit unquestionable; and *five* ample impressions are at length become insufficient to supply the demands of the profession; no apology therefore is necessary for presenting the Public with a *sixth*. To this edition particular attention has been paid, and such improvements have been attempted, as, it is hoped, will meet with professional approbation.

Since the first publication of the work, considerable changes have taken place in the laws of England. The ancient tenures, with their feudal clogs and appendages, have been either abolished by the legislature, or suffered gradually to give place to a freer circulation of property: innumerable acts of Parliament, and resolutions of the Courts, have altered the law in various particulars; but, strange as it may appear, none of these alterations are noticed in any preceding edition. So material an omission required the Editor's first attention.

The changes which the Law has undergone since the first publication of the work, have, therefore, been adverted to, either in notes distinct from the text, or in remarks listinguished by this mark (*).

Notwithstanding the general merit of the work, the reader will perceive it to be sometimes deficient in method, and exceedingly unequal and disproportionate in its differ-

ent parts. To remedy these defects, as far as it could be done without altering the text, or enlarging the work,

References have been subjoined at the foot of each chapter to books and cases of authority, where the subject is more elaborately discussed, or more methodically treated.

The Editor would think himself unworthy to be of the profession to which he belongs, if he felt the smallest inclination unjustly to depreciate the labours of his predecessors, whose wishes to benefit the profession were, possibly, as ardent as his own; but the extreme incorrectness of the last edition has obliged him, in numerous instances, to sacrifice his private feelings to what he conceived to be for the public advantage.

Thirdly, therefore, the additions made by the last editor have been attentively considered, and materially altered; many of them have been transposed, some of them new-modelled, and some expunged; new cases have also been substituted in the room of those which were thought inapplicable — these are distinguished by this mark (*).

The Editor desires, however, to assure the profession, that none of these alterations have been made without mature consideration, and it is hoped, therefore, not without evident necessity.

The typographical errors of the last edition were also found to be exceedingly numerous; and though the Editor dare not venture to assert that all of them are now expunged, yet so many have been detected as to afford him a reasonable hope, that no considerable number has escaped his observation.

Lastly, a new Table of Contents has been added; the Table of Maxims alphabetically arranged; and the Index to the principal matters considerably enlarged.

That all the additions and alterations of the present Editor were necessary, he presumes no one in possession of the old editions will deny, he rather fears it may be thought by some that *more* might have been done. It has

been suggested to him, that the work would have been rendered still more useful, had the reasons occasionally been adduced on which the grounds and maxims of the author are founded, and the exceptions to the general rules been instanced by examples. But the Editor is of a different opinion. To have done all this, so much additional labour must have been bestowed, and so much new matter introduced, that the work could no longer have maintained its present form, nor have been afforded for the moderate price it now bears. It may be remarked too, that to have added the reasons on which the maxims are founded, would have been to deprive the student of his most valuable, if not his only source of improvement. Legal knowledge can be obtained only by painful inquiry; by thinking, reasoning, and investigating; by tracing theorems to their principles, and adducing principles from established resolutions; to have done for the student what he ought to do for himself, might render his studies pleasanter, but it would also render them ineffectual.

Upon the whole, the Editor has endeavoured to do all that on an attentive perusal appeared to be absolutely necessary, and no more. Whether he has successfully executed his intentions, it better becomes others to say than himself; he hopes that he has not exceeded them; for in editing an approved work, he thinks it invariably better to do too little than too much; omissions will frequently be supplied by the judgment of the reader; but the effect of redundancies, increase of price, and consumption of time, no efforts of his can easily repair.

PREFACE

TO THE FIRST EDITION.

(*From the Ninth Edition; but prefixed to the former editions as an* "INTRODUCTION.")

The matters contained, and handled in this ensuing Treatise, are chiefly as follows; viz.—

A SUMMARY consideration of the whole law, divided into the laws of reason, custom, and statutes.

What things these laws chiefly concern; as men's possessions of chattels, and of lands, wherein some have fee-simple, some fee-tail, some estate for life, some for years, some at will, some have remainders, some have reversions: and the remedies those men shall have against them who wrong them in those estates.

Of whom lands are holden, and by what service, and what advantage the lord and guardian shall have by their tenure, as ward, relief, and marriage.

Of rent, common of pasture, way and liberties in lands, and the remedies to enjoy the same.

Of chattels real and personal, and some other things thereunto belonging.

How these estates in lands and chattels may be lawfully conveyed and assured from one man to another, by what instrument, deed, or writing; as by feoffment with livery of seisin, grant with attornment, bargain and sale inrolled, lease, assignment, release, confirmation, warranty, covenant, either absolute or upon condition.

Also of bargaining, selling, lending, restoring, promising, &c. of chattels personal, and how far a man shall be charged with the act or misdemeanor of another.

How these things may be left to our posterity after our death, by our will, our goods to our executors, and our lands to our heirs, or otherwise at our pleasure.

Lastly, for that divers controversies do often arise about the same, I have set down how the same may quietly be ended by friends, and of a ward, and of other things belonging to the same. And where gathered, some at the bar, and some out of divers learned writers, and expositors of the law.

These grounds and maxims of the law, being originally written in French *are therein very elegant and sententious: But now by their translation in our vulgar tongue, lose some of their grace and beauty, a thing incident unto all translations, which, if it cannot be avoided, it is therefore to be the rather tolerated, because they are very profitable for those who do not understand the* French *tongue.*

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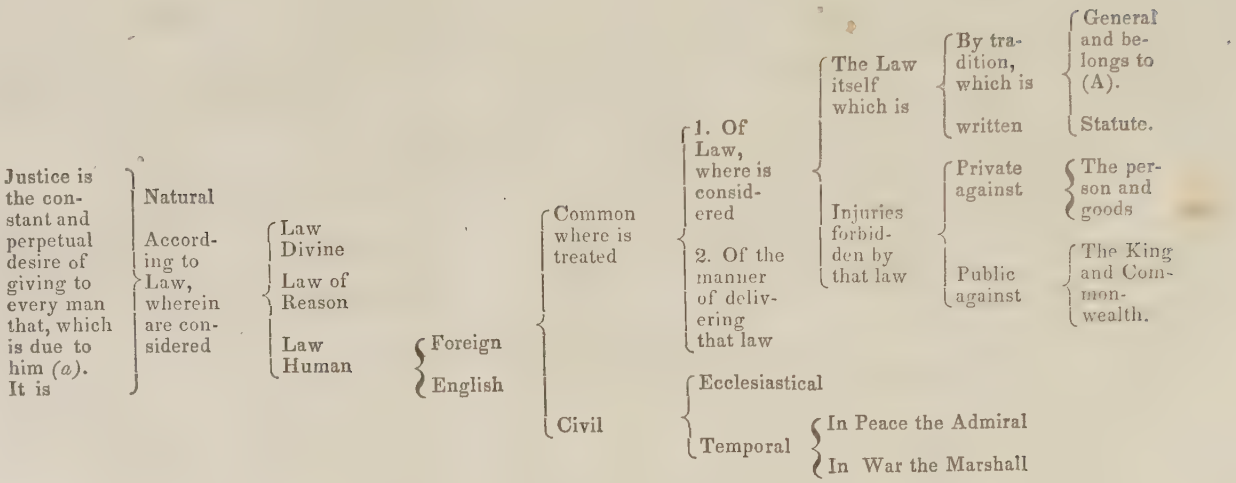
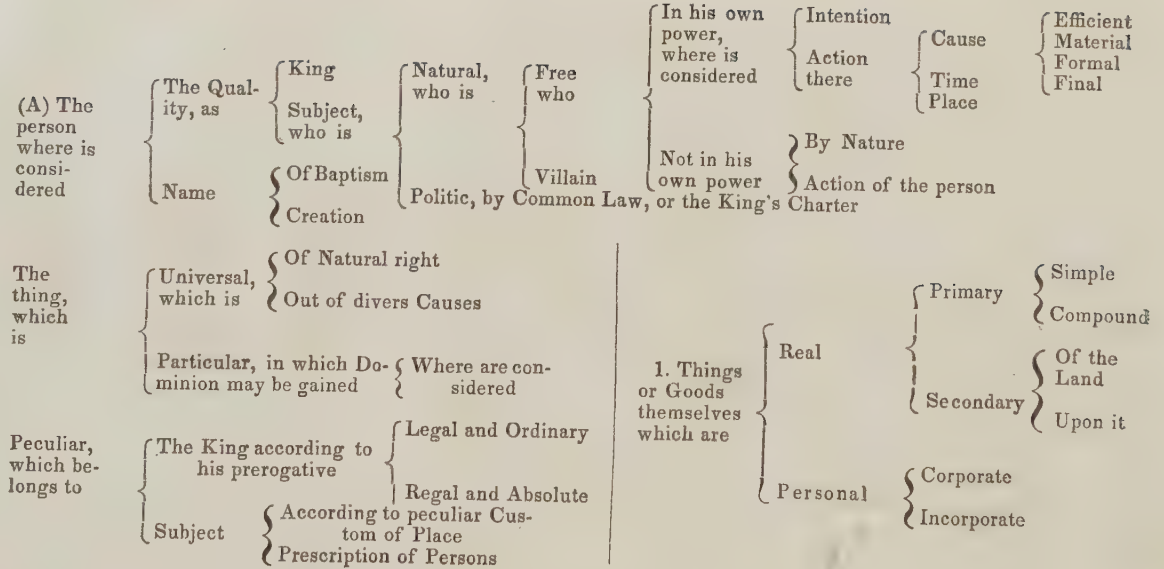
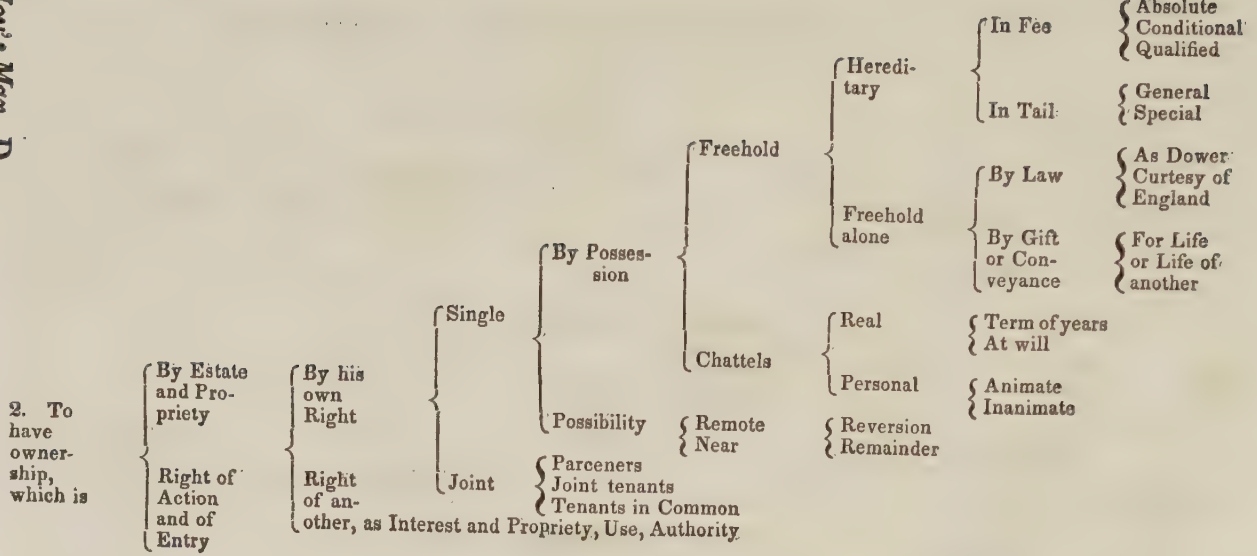
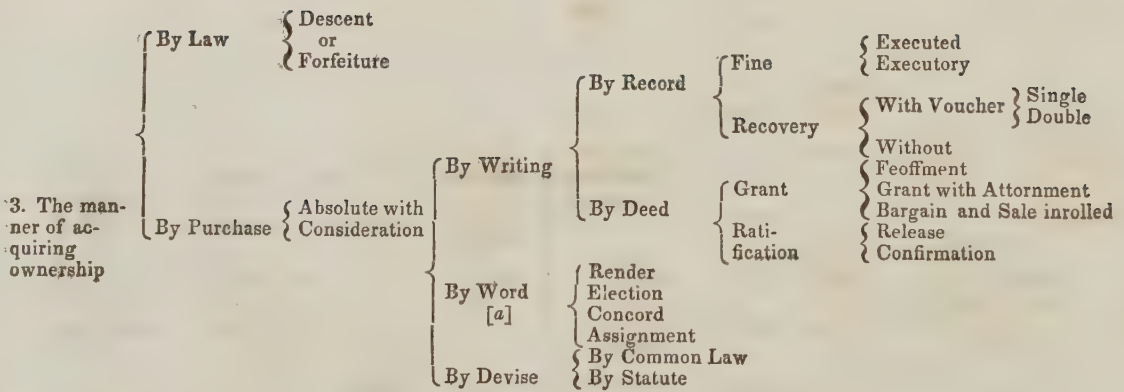
AN ANALYSIS OF THE LAWS OF ENGLAND.

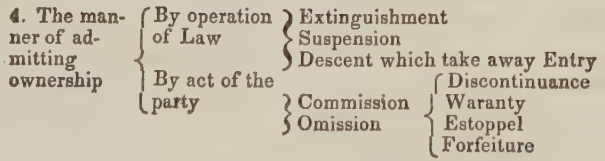


(a) Just. Inst. lib. 1. tit. 1.

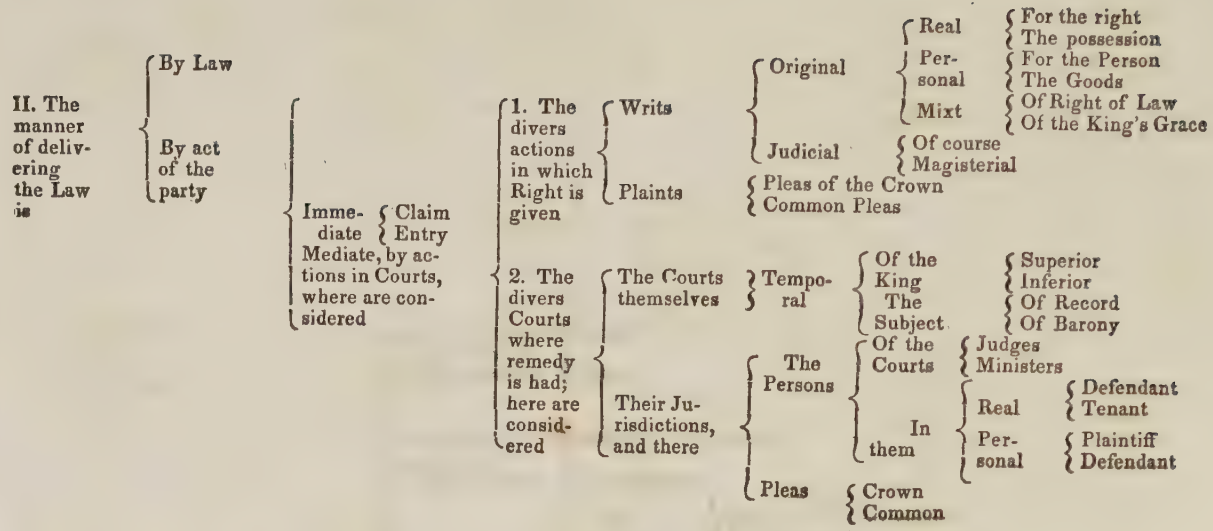

(A) The person where is considered
The Quality, as
King
Subject, who is
Natural, who is
Free
Villain
Politic, by Common Law, or the King's Charter
Name
Of Baptism
Creation
In his own power, where is considered
Intention
Action there
Cause
Time
Place
Efficient
Material
Formal
Final
Not in his own power
By Nature
Action of the person
The thing, which is
Universal, which is
Of Natural right
Out of divers Causes
Particular, in which Dominion may be gained
Where are considered
1. Things or Goods themselves which are
Real
Primary
Simple
Compound
Secondary
Of the Land
Upon it
Personal
Corporate
Incorporate
Peculiar, which belongs to
The King according to his prerogative
Legal and Ordinary
Regal and Absolute
Subject
According to peculiar Custom of Place
Prescription of Persons


2. To have ownership, which is
By Estate and Propriety
Right of Action and of Entry
By his own Right
Right of another, as Interest and Propriety, Use, Authority
Single
Joint
By Possession
Possibility
Freehold
Chattels
Remote
Near
Parceners
Joint tenants
Tenants in Common
Hereditary
Freehold alone
Real
Personal
Reversion
Remainder
In Fee
In Tail
By Law
By Gift or Conveyance
Absolute
Conditional
Qualified
General
Special
As Dower
Curtesy of England
For Life
or Life of another
Term of years
At will
Animate
Inanimate





[a] Since the Statute of Frauds, all grants, &c., must be in writing.


II. The manner of delivering the Law is
By Law
By act of the party
Immediate
Claim
Entry
Mediate, by actions in Courts, where are considered
1. The divers actions in which Right is given
Writs
Plaints
Original
Judicial
Real
Personal
Mixt
For the right
The possession
For the Person
The Goods
Of Right of Law
Of the King's Grace
Of course
Magisterial
Pleas of the Crown
Common Pleas
2. The divers Courts where remedy is had; here are considered
The Courts themselves
Their Jurisdictions, and there
Temporal
The Persons
Pleas
Of the King
The Subject
Superior
Inferior
Of Record
Of Barony
Of the Courts
In them
Judges
Ministers
Real
Personal
Defendant
Tenant
Plaintiff
Defendant
Crown
Common

- 3. The manner of Prosecution in Courts
  - Direct
    - By Process
    - By Pleading with that
      - Plea
      - Trial
      - Judgment
      - Execution
  - Collateral
    - By the Court-adjournmen
    - By Persons in the Court, as Essoin
- 4. The manner of defeating the process
  - By Prohibition
  - Assignation of Errors
- 5. The manner of taking away the punishment
  - Flight
  - Pardon

MAXIMS

OF THE

ENGLISH LAWS.

CHAP. I.

The laws of *England* are threefold—

Common Law, Customs, and Statutes.

The common law is grounded on the rules of reason, and therefore we say in argument, that reason wills, that such a thing be done; or, that reason wills not that such a thing be done. The rules of reason are of two sorts, some taken from learning as well divine as human, and some proper to itself only.

OF THEOLOGY.

1. *Summa ratio est, quæ pro religione facit (a).*

Where there is a tenure to find a preacher, if the lord purchase parcel of the land, yet the whole service remains, because it is for the advancement of religion.

† If any general custom were directly against the law of God, or if a statute were made directly contrary to the

(a) *The height of reason is, that which is done for religion.* Co. Litt. 341. *a.* *Wing. Max.* 3.

law of God — as for instance, if it were enacted, that no one should give alms to any object in ever so necessitous a condition, such a custom or such an act would be void. — *Doct. and Stud. lib.* 1, *cap.* 6.

[On the principle of the foregoing maxim, it has been held, in England, that although regularly acts of parliament do not bind the king, unless he be particularly named, yet he is included in the general words of statutes for the furtherance of religion. *See* 5 *Co.* 14 b ; 2 Co. 44 b.]

[On the same principle are founded the acts of almost every civilized state, prohibiting noisy and indecent sports, on a Sunday ; as, in England, bull-baiting, bear-baiting, &c. by stat. 1 *Car.* 1 ; or labour *(b)*, (except works of necessity or charity) or crying, or exposing goods to sale ; but not to extend to dressing meat in families, inns, &c. nor to crying milk, morning or evening, 3 *Car.* 1. *c.* 1 ; 29 *Car* 2. *c.* 7 ; or to crying mackerel, before and after divine service, 10 & 11 *W.* 3. *c.* 24 ; and such fish carriages may pass, whether laden, or returning empty. 2 *Geo.* 3, *c.* 15.]

[So, in Virginia, all labour, on a Sunday, is prohibited, except in the ordinary household offices of daily necessity, or other works of necessity or charity. 1 *Rev. Code of* 1819, *p.* 555 § 5.]

[2] 2. *Dies dominicus non est juridicus (a).*

Sale on a Sunday shall not be accounted a sale in a market, to alter the property of the goods. *Wing. Max.* 5. *pl.* 4.

† If a fine be levied with proclamations according to the statute of 4 *H.* 7. cap. 24, if any of the proclamations be made on a Sunday, all the proclamations will be erroneous,

(b) A person can commit but *one* offence on the *same* day, by "*exercising his ordinary calling on a Sunday*" — *Crepps* v. *Durden et al.* Cowp. 640.

(a) Sunday is no day in law. Co. Litt. 135. a. 2 *Saund.* 291. *Wing. Max.* 5.

because the judges cannot sit on a Sunday, for this day is exempt from such business by the common law, by reason of the solemnity of it, in order that all mankind may apply themselves to their devotions, and the honour of God (*b*).

† If the teste of a writ of *Scire facias* be on a Sunday, it is error, because it is not a day in bank. *Dyer* 168.

† An indictment for exercising the trade of a butcher on a Sunday, must be laid to be *contra formam statuti (c)*, for it was no offence at common law. 1 *Stra.* 702.

† Law processes are not to be served on a Sunday *(d)*, unless it be in cases of treason, felony, or on an escape. — 5 *Ann. c.* 9; 29 *Car.* 2. *c.* 7 *(e)*.

† If any part of the proceedings of a suit in any court of justice be entered and recorded to be done on a Sunday, it makes all void. 2 *Inst.* 264; *See* 3 *Bur.* 159.

† The service of a citation on a Sunday is good, and not restrained by 29 *Car.* 2. *c.* 7. and by two Judges the delivery of a declaration on a Sunday is well enough, it not being a process; but *Holt*, C. J. thought it ill, because the act intended to restrain all sorts of legal proceedings. 1 *Ld. Raym.* 706.

† A writ of inquiry cannot be executed on a Sunday. 1 *Stra.* 387.

[See further on the subject of Maxim 2, 1 *Atk.* 58; 1 T. R. 265; *Comy. Dig.* Temps. (B. 3); 20 *Vin. Abr.* 61; 4 *Bl. Com.* 63; 1 *Haw. P. C.* 11; 3 *Burn. Just.* 106; *Hen. Just. (3rd edi.) tit.* Sabbath Breakers.]

(b) *Plowd.* 265. *Dyer* 181. b. And although the proclamations should be made on days which were *dies juridici*, yet if the contrary appear on record, the proclamations will be void; as no averment can be admitted against the record. 5 *Cru. Dig.* 99.

(c) *Against the form of the statute.*

(d) And therefore, false imprisonment lies for an arrest on a Sunday, 1 *Salk.* 78. 5 *Mod.* 95.

[*(e)* So, by the laws of Virginia, process for treason, felony, riot, breach of the peace, or escape out of prison or custody, may be executed on a *Sunday*. 1 *Rev. Code of* 1819, p. 281 § 19. — So process of attachment against debtors *actually* absconding. *Ibid. p.* 480 § 19.]

OF GRAMMAR.

Of grammar, the rules are infinite in the etymology of the word, and in the construction thereof; what is nature, is simple.

3. *Ad proximum antecedens fiat relatio, nisi impediatur sententia (a).*

As an indictment against *J. S.* servant to J. D. in the county of Middlesex, butcher, &c. is not good; for servant is no addition, and butcher shall be referred to J. D. which is the next antecedent.

† An indictment that *Elizabeth* was in peace, &c. till *A.* the husband of the aforesaid *Elizabeth* of *D.* in the county of *S.* yeoman, murdered her, is good; for yeoman is an addition for the man only, and therefore the town must necessarily refer to the husband; but an indictment against *Alicia S.* of *D.* in the county of *S.* wife of *J. S.* spinster, &c. is not good, for spinster being an indifferent addition for man or woman, should refer to *J. S.* which is the next antecedent, and so the woman has no addition. *Dyer* 46 *b.*

* Sir *Thomas Cheyney* devised to *H.* his son, and to the heirs male of his body, remainder to *Thomas Cheyney* of *D.* and the heirs male of his body, upon condition that *he* or *they* or any of them should not discontinue. It became a question whether *H.* the son was included within the words *he* or *they;* and it was resolved that they did not refer to him, but to *Thomas Cheyney* of *D. and the heirs male of his body.* This sentence being the last antecedent. 5 *Co.* 68, *Cheyney's Case.*

[See further 2 *Haw.* P. C. *book* 2, *ch.* 23, *s.* 111; 2 *Hale* P. C. 176, 177.]

(a) The antecedent bears relation to what follows next, unless it destroys the meaning of the sentence. Jenk. Cent. 180.

OF LOGIC.

4. *Cessante causa cessat effectus (a).*

Neither the executor, nor the husband, of a woman guardian in socage, shall, after her death, have the wardship, because the natural affection is removed which was the cause thereof *(b)*.

† It is no principal challenge to a juror that he has married the party's mother, if she is dead without issue, for the cause of the favour is removed. 14 *H.* 7, 2, *(c)*.

† If the conusor in a statute-merchant be in execution and his lands also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it until the debt be satisfied; therefore the discharge of the debt, which is the cause, discharges the execution which is the effect. Co. Litt. 76 *(d)*.

† Upon a divorce, the woman shall have the goods given in marriage, not being spent; for the goods were given in advancement of the woman, and therefore it is reasonable that she should have them, the cause and consideration of the gift being defeated; for the cause ceasing, the effect also ceases. *Dyer* 13. (61). *(e)*.

(a) When the cause ceases, the effect ceases. Co. Litt. 70 b. 76 a. 78 b. 11 Co. 49 b. 13 Co. 38. Wing. Max. 29. Plowd. Com. 268.

(b) Litt. s. 125. *Co. Litt.* 90 a. *Wing. Max. p.* 37, *pl.* 60. Fitzherbert cites two authorities, which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so *personal* as not to be transmissible to executors, why should it be so to grantees? Accordingly, in arguing a modern case, it seems to have been taken for granted, that guardianship in socage cannot be assigned. *Gilb. Eq. Rep.* 177. *Hargr.* n. *Co. Litt.* 90 *b* (1). The executor or husband have not the affection the testator or his wife had, and which affection was the cause why the law gave them the wardship. *Finch's Law*, 9.

(c) Hargr. n. Co. Litt. 156 *a.* (2). *Finch's Law*, 9.

(d) Vide 5 *Bac. Abr.* 706. *Release*, (1).

(e) If the husband alien his wife's land, and they be afterwards divorced *causa præcontractus*, or any other divorce which dissolves the

† The original cause of an amerciament being pardoned, the amerciament is pardoned: And if a man wound another the first day of May, and the King pardon him of all felonies and misdemeanors, the second day of May; but the party dies of his wounds the third day of May, so as this is no felony till after the pardon, yet the felony is pardoned; for the misdemeanor being pardoned, all things ensuing thereupon are also remitted *(f)*.

* Though the general rule of law is, that a husband shall be answerable for the debts contracted by his wife, yet if they be legally separated, or if the wife carry on a sole trade, as by the custom of many places she may, the husband is no longer liable, for *cessante causa cessat effectus*. *See* 2 *Bl. Rep.* 1179; 1 T. R. 5; *Cook.* B. L. 36.

* If lessee commit waste, no action will lie if the thing wasted be repaired before the commencement of the action, because the cause of the action has ceased. *Co. Litt.* 204.

† If one grant a stewardship of a manor, and afterwards the manor is dismembered, the office is determined. If a corporation grant the office of a town-clerk, and surrender their patent to be renewed, all their offices are determined. *Hutton's Rep.* 87. And if the King grant an office to one at will, and twenty pounds salary during life, *pro officio illo* *(g)*, now if the King remove him from his office, the salary shall cease *(h)*.

† If an annuity be granted to two for counsel, and one of them refuse, the office and grant being entire, and not

marriage *a vinculo matrimonii*, the wife during the life of the husband may enter by the stat. 32 *Hen.* 8 c. 28. 8 *Co.* 73 a. *Co. Litt.* 326 a.

(f) *Plowd.* 401. 5 *Co.* 49 *b.* 6 *Co.* 79 b. *Dyer*, 99 *b. pl.* 65. *Wing. Max. reg.* 37, *pl.* 61. 1 *Hale*, H. P. C. 426. 5 *Bac. Abr.* 292. *Finch's Law*, 9.

(g) *For his services.* Co. Litt. 42 a. Finch's Law, 8. Wing. Max. 37, pl. 59.

(h) 5 *Edw.* 4. 8. b.

severable, the cause ceasing but in one, the whole annuity shall cease (*i*).

† But I find some exceptions in our books to this maxim; as where a man held rent by castle-guard, though the castle was ruined, yet the rent remained. *Davis's Rep.* And an arbitrament was between two of divers things; and among others, there was one article that one party should have yearly for the space of six years twenty shillings towards the keeping and educating of *A. B.* and *A. B.* died before the fourth year of the sixth year, yet the payment of the twenty shillings shall not cease during the six years, which is a certain term, and a duty to the party himself towards the finding of *A. B.* *Dyer* 329. a. (13).

5. *Some things shall be construed, according to the original cause thereof.* [3]

The executor may release before the probate of the will, because his title and interest is by the will, and not by the probate (*a*).

To make a man swear to bring me money upon pain of killing, if he bring it accordingly, it is felony (*b*).

Outlawry in trespass is no forfeiture of land, as outlawry of felony is; for although the non-appearance is the cause of the outlawry in both, yet the force of the outlawry shall be esteemed according to the heinousness of the offence, which is the principal cause of the process (*c*).

(*i*) If the King grant any office, whatsoever it be, which requires confidence or diligence, to two men, and one of them is attainted, there, perhaps, the whole office is forfeited to the King. For of an entire thing the King shall have the whole or nothing, for he shall not make another grantee to occupy in common with the other. *Plowd.* 380 a. 5 *Bac. Abr.* 212, 8vo. ed.

(*a*) An executor, before probate, may sell, give away, or dispose as he thinks proper, of the goods and chattels of the testator. *Off. Ex.* 34, 35. 3 *Bac. Abr.* 52, 8vo. ed.

(*b*) *Finch's Law*, 10. *See* 1 *Haw.* P. C. 96.

(*c*) *Co. Litt.* 128 a. and b. *Plow.* 541.

† So where two persons fight after a former quarrel, it shall be presumed to be out of malice from the first falling out *(d)*.

† In civil cases, when the law gives power and authority to do any thing, the law judges of the thing itself by the act subsequent: as the law gives me power to enter a tavern; the lord to distrain his tenant's beasts; him in reversion to view if waste be made; a commoner to enter into the land to see his beasts, &c. But where he who enters a tavern commits a trespass by carrying away any thing, or the lord who distrains for rent, &c. stays the distress; or if he who enters to view waste breaks the house, or remains there a whole night, or the commoner cuts down trees, in these and the like cases the law will judge by the subsequent act, that they entered for that purpose, and they will be trespassers from the beginning. 8 *Co.* 146 *b (e)*.

† Where a tenant in tail has issue two daughters, and dies, and the elder enters into the whole, and after entry makes a feoffment with warranty, which is a lineal warranty to the one and collateral to the other; the law judges by the act subsequent that the entry was not general for them both, but that it was only for her who made the feoffment; and it shall be warranty to commence by disseisin for the one moiety. 9 *Co.* 11 a *(f)*.

* If judgment be had, or a fine levied, in pursuance of an usurious or unlawful contract, it may be avoided by averring the corrupt agreement. 2 *Haw.* P. C. 240.

* A man *non compos* shall not be punished for an offence against the laws, because his *madness* and not his intention was the cause. 2 *Co.* 124.

* If a man illegally detained in confinement, in order to obtain his liberty, promises an obligation at a future time and perform it accordingly; yet it shall be void. *Finch's Law.* 10.

(*d*) *Finch's Law*, 10. (*e*) *Perk. s.* 191. (*f*) *Litt. sec.* 710.

6. *Some things shall be construed according to the beginning thereof.*

As if a servant, who is out of his master's service, kill his master, through the malice which he bore him when he was his servant, this is petty treason *(a)*.

† It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contents itself with the *immediate cause*, and judges of acts by *that* without looking to any farther degree *(b)*.

† If I make a feoffment in fee, upon condition that the feoffee shall enfeoff over, and the feoffee be disseised, and a descent cast, and then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land, this is no breach of the condition, because the land was never liable to the statute, and the possibility that it should be liable upon the recovery, the law does not respect. *Pilkington* v. *Winnington*, 2 Co. 59 b *(c)*.

† So if I enfeoff two, upon condition to enfeoff, and one of them take a wife, the condition is not broken, and yet there is a remote possibility that the other joint-tenant may die, and then the feme is entitled to dower *(d)*.

† So if a man purchase land in fee-simple, and die without issue; in the first degree the law respects dignity of sex and not proximity; and therefore the remote heir

(a) *See Plow.* 260; 1 *Haw.* P. C. 88.

(b) *Reg.* 1 *Bac. Max. Tracts.* 35.

(c) *Vide Litt. s.* 358. *Perk. s.* 801.

(d) The legal estate vested in a *trustee* in fee, or a *mortgagee* in fee of a forfeited mortgage, is in equity protected against *his* judgments, and other incumbrances, *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278. 1 Madd. Ch. 456, 2d. ed.; and from the dower of the wife, *Noel* v. *Jevon*, 2 Freem. 43. 9 Vin. Abr. 226, pl. 51. *Bennett* v. *Pope*, 2 Freem. 71; and from the tenancy by the curtesy of the husband of a female trustee, or mortgagee in fee, *Cashborn* v. *English*, 7 Vin. Abr. 156. 2 Eq. Ca. Abr. 728. 1 Atk. 603. *S. C.* 1 Cru. Dig. 523, 2d ed. Sug. Gilb. Uses, 18, n.

on the part of the father shall have it before the near heir on the part of the mother (*e*). But in any degree *paramont* the first, the law respects not; and therefore the near heir by the grandmother on the part of the father, shall have it before the remote heir of the grandfather on the part of the father.

(*c*) *Lord Bacon's Elements*, *Reg.* 1. *p.* 3. *Tracts*, 37. So according to *Clere* v. *Brook*, Plowd. Com. 450, when several are equally worthy in blood, as if all are of the male line on the part of the father ascending, or of the female line on the part of the father, the nearest shall be preferred in the succession; but if one is more worthy in blood than another, as if one is heir of the male line on the part of the father ascending, and the other is heir of the female line on the part of the father, their proximity is not regarded, but the more worthy; *viz.* the heir of the male line, though more remote, shall be preferred. And this doctrine is adopted by *Sir Matthew Hale*, Hist. Com. Law, 268, &c. ed. 1779. *Lord Chief Baron Gilbert*, Tenures, 19. *William Osgoode*, *Esq.* of Lincoln's-Inn, afterwards Chief Justice of Lower Canada, in a Tract, entitled, "Remarks on the Laws of Descent; and on the reasons assigned by Mr. Justice Blackstone, for rejecting, in his Table of Descent, a point of doctrine laid down in Plowden, Lord Bacon, and Hale." *Dr. Woodeson*, 2 Lectures, 262, and *Mr. Cruise*, 3 Dig. 380, 2d ed.

The contrary position has been maintained by *Mr. Robinson*, "Law of Inheritances in Fee-simple," ch. 6. 55, &c. ed. 1755. *Mr. Justice Blackstone*, 2 Com. 238. *Professor Christian* has endeavoured to support Blackstone, 2 Com. 240, and *Mr. Osgoode*, in another anonymous Tract, entitled, "Remarks on the Inconsistency of the Table of Descents, projected by Mr. *Professor Christain*, in the twelfth edition of the Commentaries, with the Doctrine laid down by *Sir William Blackstone*, and by every writer on the Law of Descents," has opposed the doctrine of the Annotator with much clearness and force of reasoning. *Mr. Watkins*, "Law of Descents," 187, 3d ed. supports *Justice Blackstone* with much energy, though, it must be confessed, there is in this instance a want of clearness sometimes in his reasoning. A case exactly in point arose on the *Midland Circuit* in 1805, and was intended to have been argued in Westminster Hall, but was compromised. Several eminent counsel were however consulted, among whom the late learned *Mr. Serjeant Williams*, the celebrated editor of *Saunders's Reports*; and they were all of opinion that *Sir W. Blackstone's* doctrine was wrong. 3 *Cru. Dig.* 411. [For the law of descents, in the several states in the union, see GRIFFITH'S LAW REGISTER OF THE UNITED STATES. No professional or private gentleman should be without this very useful book.]

† The second rule under this maxim fails in covenous acts, which though they be conveyed through many degrees and reaches, yet the law takes heed to the corrupt beginning, and accounts all as one entire act.

† As if a feoffment be made of lands held by knights service to *J. S.* upon condition, that within a certain time he shall enfeoff *J. D.*, which feoffment to *J. D.* shall be to the use of the wife of the first feoffer for her jointure, &c. this feoffment is within the statute of 32 *H.* 8. *nam dolus circuitu non purgatur (f).*

† In like manner, this rule holds not in criminal acts, except they have a full interruption, [affording sufficient time for the passions to cool,] because when the intention is matter of substance, and that which the law principally beholds, there the first motive will be principally regarded, and not the last impulsion. As if *J. S.* of malice prepensed discharge a pistol at *J. D.* and miss him, whereupon he throws down his pistol, and flies, and *J. D.* pursues him to kill him, whereupon he turns and kills *J. D.* with a dagger; if the law should consider the last impulsive cause, it would say, that it was in his own defence; but the law is otherwise, for it is but a pursuance and execution of the first murderous intent.

† But if *J. S.* had fallen down, his dagger drawn, and *J. D.* had fallen by haste upon his dagger, there *J. D.* had been *felo de se*, and *J. S.* shall go quit. 44 *E.* 3.

† Also you should not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

† For if a disseisor enter into religion, the immediate cause is from the party, though the descent be cast in law: For the law only executes the act which the party procures, and therefore the descent shall not bind, *et sic e converso (g).*

† If a lease for years be made rendering a rent, and the lessee make a feoffment of part, and the lessor enter, the

(f) For fraud is not purged by circuity. *(g) And so on the contrary.*

immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party; but it is only the pursuance and putting in execution of the title which the law gives; and therefore the rent or condition shall be apportioned. *Dyer*, 4 *b. arg.*

† So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds;

† And therefore if a feme covert be dissesised, and the baron die, and she take a new husband, and then the descent is cast: or if a man that is not *infra quatuor Maria (h)*, be disseised, and he return into England (*i*), and go over sea again (*k*), and then a descent is cast, this descent binds because of the *interim* when the persons might have entered; and the law respects not the state of the person at the last time of the descent cast, but a continuance from the very disseisin to the descent. *Dyer*, 143 b. 144 a 9 *H.* 7. 24.

† So if baron and feme be, and they join in a feoffment of the wife's land rendering a rent, and the baron die, and the feme take a new husband before any rent-day, and he accepts the rent, the feoffment is affirmed for ever.

7. *Some things shall be construed according to the end thereof.*

As if a man warned to answer a matter in a writ, there he shall not answer to any other matter than is contained in the writ, for that was the end of his coming. *See Co. Lit.* 1. 3.

† Vouchee comes into court to be viewed, and being viewed is adjudged of full age, yet he shall not be com-

(*h*) *Within the four seas.*

(*i*) If it be proved he had notice of the disseisin, either before or when he was in the kingdom. Vide Litt. s. 440.

(*k*) But the law seems otherwise if he be sent beyond the sea in the King's service by his command. *West's Symb. part* 2, 68 a *Shep. Coun.* 58. 77. *Plowd.* 366 a. vide further on this subject *Doe*, ex dem. *Duroure* v. *Jones*, 4 Term Rep. 300.

pelled to answer till he comes in for that purpose by another process. 31 *Edw.* 3. Fitz. Abr. tit. Joinder in Action, pl. 10.

8. *Derivativa potestas non potest esse major primitiva (a).* [4]

A servant shall be estopped to say the freehold is belonging to his master, by a recovery against his master, although the servant be a stranger to the recovery; for he shall not be in a better case than he is in, whose right he claims or justifies.

† The bailiff of the disseisor shall not say that the plaintiff has nothing in the land, for the master himself should not have such a plea, inasmuch as he is not tenant of the freehold. 28 Ass. pl. 24 (*b*).

* Where lessee opened a coal mine in *land* demised to him, and assigned over his term, the assignee could not work the mine, because the lessee having no right could not assign any, the *land* only having been let to the lessee. *Co. Lit.* 321; 5 *Co.* 113.

9. *Quod ab initio non valet, in tractu temporis non convalescit (aa).*

If an infant or married woman make a will, and publish the same, and afterwards die, being of full age or sole *(bb)*, notwithstanding, this will is void.

(a) The power derived cannnt be greater than that from which it is derived.

(b) Wing. Max. p. 66.

(aa) That which is not good in the beginning, no length of time can make good.

(bb) But if the testament being made during the coverture, she approve and confirm the same after the death of her husband; in this case the will is good, by reason of her new consent, or new declaration of her will; for then it is as it were a new will. *Swimb.* 88. And although the will be made before marriage, and the wife survive the husband, yet it seems that the will shall not revive upon the husband's death. *Mrs. Lewis's* case, 4 Burn's Eccles. Law, 51, 6th ed. vide 2 P. Wms. 624. For, as it is the

† If a man seised of lands in fee make a lease for twenty-one years, rendering rent, to begin presently, and the same day he make a lease to another for the like term, the second lease is void; and if the first lessee surrender his term to the lessor, or commit any act of forfeiture, &c. of his lease, the second lessee shall not have his term; because the lessor at the making of the second lease, had nothing in him but the reversion. *Plow.* 432.

† A bishop makes a lease of lands for four lives, which is contrary to the statute *(c)*, though one of them dies in his life-time, so as now there be but three, and afterwards he dies, yet it shall not bind the successor; for those things which have a bad beginning cannot be brought to a good end. 10 *Co.* 62 a.

nature of a will to be ambulatory during the testator's life, and marriage disables her from making any other will, the instrument ceases to be any longer ambulatory, and must be therefore void. *Forse* v. *Hembling*, 4 Co. 61 b. But where an estate is limited to uses, or a trust is created, and a power is given to a feme covert before marriage, to dispose of the property by way of appointment, notwithstanding coverture such appointment either by deed or will may take effect. *Doe* v. *Staple*, 2 Freem. Rep. 695. But where, by marriage articles, a woman had power to dispose of her property by will *after marriage*, subsequent to the articles, but a few hours *before the marriage* she made a will, which was held to be revoked by the marriage. *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534. *Doe* v. *Staple*, 2 T. R. 684. Et vide Sug., Pow. 264.

By the civil law, the will of a woman made before marriage, who survives her husband, is of as great force as if she had not been married at all, *Swimb. p.* 2 *s.* 9. which was followed in *Brett* v. *Rigden*, Plowd. Com. 343; and the reason given is, that if it should be considered according to the time of the date, the will would be countermanded by the espousals; but it is not so, for it does not take effect until her death, at which time she was discovert, as she was at the time of making the will, and the inter-marriage shall not countermand that which was of no effect in her life-time. *Godol. O. L.* 29. 8 *Vin. Abr.* 138, pl. 1. *Pow. Dev.* 564. Mr. Cruise follows this opinion, 6 *Dig.* 118. *s.* 51. 2*d edition.*

The law seems to be as settled in Mrs. *Lewis's* case. See further, *Roper, on Revocation*, 20. 1 *Rob. Wills*, 372. 1 *Bac. Abr.* 483. *Serjt. William's note*, 1 *Saund.* 278 b. 1 *Powell's Swimb.* 145. *Eden's note*, 2 *Bro. C. C.* 544. 2 *Rop. Husband and wife*, 70. 2 *Bl. Com.* 499.

(c) See 4 *Bac. Abr.* 69, *Gwil. edit. Leases (E), Rule* 4.

† But if I let to *B.* an acre by deed indented, in which I have nothing, and I purchase it afterwards, it is said it may be a good lease (*d*).

† Yet where a lease is made for life, the remainder to the corporation of *B.*, where there is no such corporation, it is void, though the king create such a corporation during the particular estate: So a remainder limited to *A.*, the son of *A. B.*, he having no such son, and afterwards a son is born to him, whose name is *A.* during the particular estate, yet it is void. *Doder. Eng. Law*, 233, 234.

† If a fine be levied without any original it is voidable, but not void; but if an original be brought, and a *retraxit* entered, and after that, a *concord* is made, or a fine levied, this is void, in respect the truth appears on record. *Co. Litt.* 352 b (*e*).

† A feoffment is made to the use of the husband for life, the remainder to *A. B.* remainder to the wife for her jointure, and *A. B.* dies in the life-time of the husband; this is not a jointure to bar dower, because it does not take effect immediately after the death of the husband. *Hutt. Rep.* 50 (*f*).

10. *Unumquodque dissolvitur eo modo quo colligatur (a).*

An obligation or other matter in writing, cannot be discharged by an agreement by word, but by writing.

(*d*) Which is an exception to the rule, *Plowd.* 434 (*c*). *Plowd. Quær.* 124 (*b*). *Litt. s.* 58. *Co. Litt.* 47 *b. et n.* (11). *Hawk. Abr.* 77. *Finch's Law*, 109. 4 *Cru. Dig.* 307. *s.* 56. 2*d. edit.* 4 *Bac. Abr.* 189. *Vide Perk. s.* 65. 159.

(*e*) *Bro. Abr.* Fine, pl. 18. *Co. Reading* 10. *Tr.* 253. 5 *Cru. Dig.* 76.

(*f*) *Et vide* 4 *Co.* 3 a. 3 *Bac. Abr.* 713. Jointure (B) 1.

(*a*) *Every thing is dissolved by the same mode in which it is bound together. Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est.* Wing. Max. p. 68. 2 Inst. 573. It would be inconvenient that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved

† As no estate can be vested in the King without matter of record, so no estate can be devested out of him but by matter of record. *Plowd.* 553.

† In case of attainder and office, the King is entitled by double matter of record; and therefore if the party be aggrieved, he ought to avoid it by double matter of record. 4 *Co.* 57.

† An act of parliament cannot be avoided but by parliament; and an use which is raised by declaration and limitation, may cease only by words of declaration and limitation. *Bacon's Read. Stat. Uses.*

† Indentures being made for declaring the uses of a subsequent fine, recovery, &c. are only directory, and do not bind the estate or interest of the land; yet if the fine or recovery, &c. be pursued according to the indentures, there cannot be any bare averment, that after the making of the indentures, by mutual agreement of parties it was agreed that the assurance should be to other uses; but if other limitations of uses be made by writing or matter of so high a nature as the former, then the last agreement shall stand; for every contract and agreement must be dissolved by a matter of as high a nature as the other was. 5 Co. 26. and *Suprema potestas seipsam dissolvere potest (b).*

* So remainders, reversions, rents, advowsons, and other things which lie in grant; as they cannot be granted without deed, so they cannot be surrendered without. *Co. Lit.* 338 a.

by the uncertain testimony of slippery memory. Countess of *Rutland's* case, 5 Co. 26 a.

In equity an agreement in writing may be discharged by parol, *Legal* v. *Miller*, 2 Ves. sen. 299. 9 *Ves.* 250. 3 *Wooddeson's Lect.* 428. *Phill. on Evid.* 603. 4th edit. 1 *Fonbl. Eq.* 392. 5th edit.; but the proof must be clear, *Buckhouse* v. *Crosby*, 2 Eq. Ca. Abr. 33. 1 *Madd. Ch.* 407. 2d edit. *Sug. Vend.* 133. 5th edit. though it cannot be altered or contradicted by parol. *Roberts, on Frauds*, 89.

(*b*) *The highest power is able to dissolve itself.* See further, Gilb. Uses, 54. 259. Wing. Max. p. 71.

11. *He who claims a thing by a superior title, shall neither gain or lose by it.*

As if one joint-tenant make a lease for years, reserving a rent and die; the joint-tenant who survives shall have the reversion by survivorship but not the rent, because he comes in by the first feoffor, and not under his companion (*a*). [5]

Also where the husband having leased for years, part of the term of his wife, reserving rent, the woman shall have the residue of the term, but not the rent (*b*).

† An executor recovers and dies intestate, administration of the goods of the first testator is committed to *J. S.* *J. S.* shall not sue out execution upon this recovery. 26 *H.* 8. 7 (*c*).

† Dower cannot be assigned reserving a rent, or with a remainder over, for she is in by the husband, and not by him who assigns the dower (*c*).

* If a man devise a term to J. S. and the executors of the testator agree that he shall have it upon *condition;* J. S. shall nevertheless have it *absolutely;* for, after the assent of the executors, he is in by the devise. 8. Co. 28 b. *Westwick's case.*

(*a*) *Co. Litt.* 185 *a.* 318 a. *Finch's Law*, 13. 1 *Co.* 96 a. *Shelley's* case It seems the representatives to whom the reservation is made might maintain an action of debt, or covenant, either upon the covenant in law, or express covenant for payment of the rent, if there be any. 3 *Bac. Abr.* 696, *n.*

(*b*) 1 Roll. Abr. 344, pl. 10. 4 Vin. Abr. 49. *Sym's* case, Cro. Eliz. 33. The executors of the husband shall have the rent. Co. Litt. 46 b. *Blaxton* v. *Heath*, Poph. 145. 4 Vin. Abr. 117, pl. 10. *Sed Vide* Hal. MS. Co. Litt. 46 b. (3). 6 ves. 389. Perk. s. 834.

(*c*) *Finch*, 13. *Wing. Max. p.* 83. *pl.* 28.

12. *Debile fundamentum, fallit opus (a).*

When the estate whereunto the warranty annexed is defeated, the warranty is also defeated (*b*).

* All proceedings are void when the writ or process whereon they are founded, has been erroneous. *See Dyer* 223; 4 *Bur.* 2560. [But it often happens, in the progress of a cause, that erroneous proceedings are cured by the conduct of the adverse party, in not taking advantage of such errors, at a *proper time*, or in a *proper manner;* and finally, after verdict, by the act of *jeofails*].

* An action of debt, &c. brought by an outlaw is nugatory, because by outlawry, his right to bring actions is forfeited. *Co. Litt.* 286.

13. *Incidents cannot be severed.*

As if a man grant wood to be burnt in such a house, the wood cannot be granted away, but he who has the house shall have the wood also. 27 *E.* 4 11 b.

* If a lease is made to a man reserving rent, and the lessor grant the reversion to another, the rent passes to the grantee, although no mention be made of it in the deed, rent being incident to the reversion. *Co. Litt.* 317, *a.*

14. *Actio personalis moritur cum persona (aa).*

As if battery be done to a man, if he who did the battery, or the other die, the action is gone (*bb*).

If the lessor covenant to pay quit-rents during the term, his executor shall not pay it, for it is a personal covenant (*cc.*)

(a) A weak foundation destroys the superstructure.

(b) Litt. s. 741. *Co. Litt.* 389 a. *Butler's note, Co. Litt.* 388 *b.* (1). 7 Bac. Abr. 243. *Warranty* (O).

(aa) A personal action dies with the person.

(bb) See 6 *Mod.* 126.

(*cc*) But see 2 Bac. Abr. 69. *Covenant* (E).

† If a lessee for years commit waste, and die, no action of waste will lie against his executor or administrator for waste done before their time. *Co. Litt.* 53 b. So if the tenant commit waste, and he in the reversion die, the heir shall not have an action of waste, for the waste done in the life of his ancestor; nor shall a parson for waste done in the life-time of his predecessor. *Co. Litt.* ibid.

† If a woman tenant for life take a husband and the husband do waste, and the wife die, no action of waste lies against the husband in the *Tenuit* (*d*), for he was seised but *in jure uxoris* (*e*), and his wife was tenant of the freehold; but if a feme be possessed of a term for years, and take a husband, and the husband do waste, and the wife die, the husband shall be charged in an action of waste, for the law gives a power over the term to him. *Co. Litt.* 54. a.

† An action of debt lies not against executors upon a contract for the eating and drinking of the testator: for that action dies with him, because the executors cannot wage their law as their testator might have done. 9 *Co.* 87. (*f*).

(*d*) *He held.*

(*e*) *In right of his wife.*

(*f*) It was a principle of the common law, that if an injury were done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom, or *by* whom, the wrong was done. And from a misconception, or misapplication of this principle, it was formerly doubted, whether *assumpsit* would lie either for or against an executor; because the action, it was said, was in form *trespass* upon the case, and therefore supposed *a wrong*, and in substance to recover *damages* only *in satisfaction* of the wrong. Plow. 180, *Norwood* v. *Read;* Dy 14, pl. 69. *in margine;* 9 Rep. 86 b. 89 a. *Pinchon's* case; Cro. Jac. 294, *S. C.;* 10 Rep. 77 a. The case of the *Marshalsea;* Yelv. 20, *Slade* v. *Morley;* 1 Lev. 200, 201, *Palmer* v. *Lawson;* 2 Ld. Raym. 974, *Berwick* v. *Andrews.* But where the cause of action was founded upon any *malfeasance* or *misfeasance*, was a *tort*, or arose *ex delicto;* such as trespass for taking goods, &c. trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, where *the declaration* imputes

a tort done either to the person or property of another, and *the plea* must be not guilty, the rule was, *actio personalis moritur cum persona;* and this rule still holds with respect to the person *by whom* the injury is committed; for if he dies, no action of this kind can be brought *against* his executor or administrator, though in some of these cases, such as taking away goods, &c. a remedy may be had *against* the executor in another form. Sir W. Jones, 174, *Le Mason* v. *Dixon;* Latch. 167, 168. *S. C;* Sir T. Raym. 57, *Hole* v. *Bradford;* Palm. 330, *Carter* v. *Fossett;* Cro. Car. 540, *Perkinson* v. *Gilford;* 1 Ld. Raym. 433, 434, *Kinsey* v. *Hayward;* Cowp. 375, *Hambly* v. *Trott;* 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 98. 6 Bac. Abr. 697, 8vo. edit. But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the action survived. Latch. 168. Cro. Car. 540. Cowp. 375. It is true that no action of *account* lay either for or against an executor; not upon the principle before-mentioned, but because the account rested in the privity and knowledge of the testator only. Co. Litt. 89 b. 2 Inst. 404. But this action is since given *to* executors by the statute of West. 2. 13 Edw. 1. stat. 1. c. 23.; and *against* executors by statute 4 & 5 Anne, c. 16. s. 27. Nor did an action of debt lie *against* an executor upon a simple contract, when the testator could have waged his law; not because such action died with the person, but because the executor would lose the benefit of waging law. 9 Rep. 87 b. *Pinchon's* case; Cro. Eliz. 600. *Bowyer* v. *Garland;* Cowp. 375. For where the testator himself could not have waged his law, debt lay against his executor, as debt for rent upon a parol lease made to the testator, or by a gaoler for diet provided for him while in prison. 9 Rep. 87. b. But assumpsit always lay against an executor upon the simple contract of his testator, notwithstanding what is said to the contrary in Yelv. 20, *Slade* v. *Morley.* Plow. 180. 9 Rep. 87 b. So if the goods, &c. taken away continued, still *in specie*, in the hands of the wrong-doer, or of his executor, *replevin* or *detinue* would lie for or against the executor to recover back the specific goods, Sir W. Jones, 173, 174; or in case they were consumed, an action for *money had and received* to recover *the value.* Cowp. 377. The rule of *actio personalis moritur cum persona* has received considerable alterations by the statute 4 Edw. 3 c. 7. *de bonis asportatis in vita testatoris*, which reciting, that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, "that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner, as they whose executors they be should have had if they were living." And this remedy is further extended to executors of executors by stat. 25 Edw. 3. c. 5; and to administrators by stat. 31 Edw. 3. c. 11. The statute of 4 Edw. 3. being a remedial law, has always been expounded largely, and though it makes use of the word

†From a bare contract or promise, no action rises; it is called *nudum pactum (g)*: As where a man makes a bargain and sale of lands, goods, &c. without any consideration or recompense to be paid for it; these are void in law, and the vendee cannot bring any action. *Doct. and Stud.* c. 24.

†A promise made for a thing past is also voidable, and no action dies: But action of debt may be brought on a bond or obligation without enquiring into the consideration, and the creditor need only prove the delivery of it. *Plowd.* 309.

15. *Things of a higher nature, determine things of a lower nature.*

[6]

As matters in writing determine an agreement by words,

trespasses only, has been extended to other cases within the meaning and intent of the statute. 1 Ventr. 187, *Emerson* v. *Emerson;* Sir W. Jones, 174; 2 Ld. Raym. 974, *Berwick* v. *Andrews.* Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the testator in his life-time, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be. Latch. 168. So that he may now have trespass or trover, 5 Rep. 27 a. *Russel's case;* Sir W. Jones, 174; action for a false return, 4 Mod. 403, *Williams* v. *Carey;* for an escape, 2 Ld. Raym. 973, *Berwick* v. *Andrews;* debt on a judgment against an executor suggesting a *devastavit*, 1 Salk. 314; action for removing goods taken in execution before the testator (the landlord) was paid a year's rent, 1 Str. 212, *Palgrave* v. *Windham;* and other actions of the like kind, for injuries done to the personal estate of the testator in his life-time. See also 2 Bac. Abr. 445. fol. edit. 3 Bac. Abr. 97. Gwil. 8vo. edit. Cro. Eliz. 377, *Rutland* v. *Rutland;* 1 Ventr. 187, *Emerson* v. *Emerson.* But the statute of Edw. 3. does not extend to injuries done to *the person*, or to the *freehold* of the testator; therefore an executor or administrator shall not have actions of assault and battery, false imprisonment, slander, deceit, diverting a watercourse, obstructing lights, cutting trees, and other actions of the like kind; for such causes of action still die with the person. Sir W. Jones, 174. Latch. 168. 1 Ventr. 187. [From Wms. n. 1 Saund. 216 (1), *Wheatly* v. *Lane.* See 1 Rev. Code 390, §64, 66, as to actions *by* and *against* executors.]

(*g*) *A naked contract. Vide* 16 Vin. Abr. 16. Terms of the Law, *Nude Contract.*

If an offence which is murder at the common law, be made high treason, no appeal lies for it; because the murder is merged, and punishable as treason, for which no appeal lies. *See Dyer* 50.

† Where a man has liberties by prescription, and afterwards takes a grant of them from the King by patent, this determines the prescription; for matter in writing determines matter *in pais (a)*. 21 *H.* 7. 5.

† A man is bound to take his remedy upon his highest security. As for instance: Suppose a man has an *assumpsit*, and a deed under hand and seal, in case he proceed upon the *assumpsit*, he will be nonsuited. 2 Stra. 1027. *Bulstrode* v. *Gilburn*. See also *Co. Litt.* 115. *a*; 5 *Co.* 41. *a*.

16. *Majus continet minus (aa).*

Where by the custom of a manor a man may demise for life, he may demise to his wife *durante viduitate (bb)*.

† By pardon of murder, manslaughter is pardoned: And if an action of battery be brought, and the evidence proves it maiming, it is well; because it is battery and more. 31 Ass. pl. 1.

† Where there is a custom that a man shall not devise his lands for any higher estate than for life; yet if the devise be in fee, and the devisee claims but for life, the devise is good. When more is done than ought to be done, that seems to be done which was to be done: So that if a man tender more money than he ought to pay, it is good enough; for every greater contains the less; and the other ought to accept so much of it as is due to him. *See* 5 *Co.* 11.

(*a*) *Transacted in the country, without writing.*

(*aa*) *The greater contains the less.* Jenk. Cent. 208. 4 Co. 46.

(*bb*) *During her widowhood.* See *Whitlock's* case, 8 Co. 70 b.

17. *Majus dignum trahit ad se minus dignum (a).*

As the writings, the chest or box they are in (*b*).

† An adulterer takes the wife of another man, and new clothes her, the husband may take with his wife the clothes on her back. 11 *H.* 4. 31.

* Where a matter extends as well into a place within the jurisdiction of the *common law*, as into a *franchise*, it shall be tried at the common law. *Co. Litt.* 125. b.

* The right of *possession* shall draw with it the right of *property*, *Ibid* 266 a.

* If a man bargain and sell a manor *with all trees* growing thereon, and the manor do not pass on account of the Bargain and Sale not being enrolled, neither shall the trees pass, though as to them no enrolment is necessary. 11 *Co.* 48.

OF PHILOSOPHY.

18. *Naturæ vis maxima (aa).*

Natural affection or brotherly love are good causes or considerations to raise an use (*bb*).

And one brother may maintain a suit for another. *See* 2 *Inst.* 564; *Plowd.* 304. a; 1 *Haw.* P. C. 252.

† If there be mother and daughter, and the daughter is attainted of felony, such daughter cannot be heir to the mother; yet if after the attainder she kills her mother, this

(*a*) *The more worthy draws with it the less worthy.* 1 Inst. 43 b.

(*b*) *Off Executor*, 64.

(*aa*) *The highest force is that of nature.* Bract. c. 23. 2 Inst. 564, some say *naturæ bis maxima.*

(*bb*) In a covenant to stand seised. *Plowd. Com.* 309 a; *Sug. Introd. Gilb. Uses.* LIV. 245; 2 *Bla. Com*, 338; 2 *Roll. Abr.* 785; 2 *Sand. Uses*, 79, 80; 22 *Vin. Abr.* 124. 204; 7 *Bac. Abr.* 96. 100; *Com. Dig. Covenant* (G 3). But it is absolutely necessary that the consideration be natural love and affection to a child, or near relation or marriage. 4 *Cru. Dig.* 136, 2d *edit.*

is matricide and petit treason; for she still remains her daughter, and that by the law of nature. [The daughter not being heir to the mother, after attainder of felony, is on the principle of *corruption of blood*, which is abolished in Virginia. *See* 1 *Rev. Code* of 1819, *p.* 613. § 36].

† If the son be attainted, and the father covenants in consideration of natural love to stand seised of land to his use, this is a good consideration to raise an use; because the privity of natural affection remains. And if a man attainted, obtain a charter of pardon, and be returned on a jury between his son and another, the challenge remains; for he may maintain any suit of his son though the blood be corrupted, Bract.

* A devise to provide for one's children, &c. are good considerations to raise an use. *Co. Litt.* 21.

* A statute making it felony for *any one* to entertain persons guilty of treason, &c. shall not extend to a wife who shall entertain her husband. 1 *Haw.* 2, 93.

[7] 19. *The law favours some persons; viz.*

Men out of the realm, or in prison, women married, infants, idiots, mad-men, men without intelligence, strangers who are neither parties nor privies, and things done in right of another person.

A descent shall not take away the entry of a man out of the realm, or in prison, or of a married woman, or of an infant. *Co. Litt.* 260 *a*, *b*; 261, *a*; 262, *b*; 259, *a*; 260, *a*; 246, *a*; 245, *b*; 2 Bac. Abr. 311, *Descent* (H).

Where a lease is made to a husband and wife, after the death of the husband, the wife shall not be charged for waste, during the marriage. *See Co. Litt.* 54 a.

An idiot shall not be compelled to plead by his guardian or next friend, but shall be in the court: and he who pleads the best plea for him shall be admitted. *See Co. Litt.* 135, *b*; 247, *a*. [But see *Coop. Eq. Plead.* 32].

If a dumb man bring an action, he shall plead by his next friend.

If a lessee for years grant a rent-charge, and afterwards surrender the lease, the rent-charge shall be paid, during the term, to the grantee. *Co. Litt.* 185, *a*; 233, *b*; 238, *b*.

A man outlawed or excommunicated, may bring an action as an executor.

† The right of action of men out of the realm, &c. is saved till their impediments are removed, where others are bound by the Statutes of Limimitation. 21 *Jac.* 1. *c.* 16. 4 & 5 *Ann. c.* 16. [The same law in Virginia. *See* 1 *Rev. Code of* 1819, *p.* 491.]

* Though the wife of a common person, being an alien, shall not be endowed (*Co. Litt.* 31 *a.*); yet the wife of the king shall, though an alien born. *Co. Litt.* 31. *b.*

20. *The law favors a man's person before his possession*(*a*)

Menance of corporeal pain shall avoid a deed, but not menance of his goods.

† An idiot, one *non compos mentis*, or a lunatic shall not avoid his own deed, be it executed in person, or by attorney; inasmuch as he cannot stultify himself; but he shall not lose his life for felony or murder. 4 *Co.* 124, (*b*).

† A villian set free for an hour will be always free. *Dyer* 59. *b* (*c*).

* Fear of death, imprisonment, &c. will excuse a man from going upon his land to make his claim. But the fear of having his goods destroyed or his house burnt will not. *Co. Litt.* 246. *a.*

21. *The law favours matter of possession more than matter of right, when the right is equal.* [8]

As if a man purchase several lands at one time, held of

(*a*) *Fineh's Law*, 56.

(*b*) Co. Litt. 247 a. vide 2 Com. 291, 292. Fomb. Eq. book 1. c. 2. s. 1 notes (*d*) and (*g*).

(*c*) See Mr. Hargrave's learned notes, *Co. Litt.* 153 *a.* 3, 6. Perk sect. 314.

several lords by knight service and die, the lord who first seises the ward shall have it, otherwise the elder lord.

* Husband and wife purchase lands to them and the heirs of their bodies, and die leaving issue under 14 years of age. In this case, if the *maternal grandmother* assume the guardianship before the *paternal grandfather* doth, she shall retain it. *Finch's Law* 30; *see* also *Co. Litt.* 88 *a.*

* Tenants in common of personal estates having equal right to the goods, he that first gets possession of them shall hold them against the other. *Co. Litt.* 200 *a.*

22. *Matter of profit or interest shall be taken largely: and it may be assigned, but it cannot be countermanded; but matter of pleasure, trust or authority, shall be taken strictly, and may be countermanded.*

As a license to a person to walk in my park, or in my garden, extends only to himself, and not to his servant, nor to any other in his company, for it is matter of pleasure only. Otherwise it is of a license to hunt, kill, and carry away the deer, which is matter of profit.

A church-way is matter of ease.

† It is felony in the sheriff to behead one who ought to be hanged. 35 *H.* 6. 58.

† A license to come into my house to speak with me, or a letter of attorney may be countermanded (*a*). So of goods bailed over to be delivered to *J. S.*, or to dispose of them in alms. Otherwise it is of a thing bailed in consideration or satisfaction of another thing; as if the bailor had been bound to pay such a sum; or if he says, that whereas *J. S.* has enfeoffed him of such land in consideration thereof he gives him the money. *Dyer*, 49.

* A man deviseth that his two executors shall stake the profits of his lands until his heir be of age, to pay debts, &c., one of them dies, and then the other, who leaves executors. The executors of him last dying shall take the

(*a*) So of a license, 4 *Term Rep.* 78.

profits, because it is a matter of *interest*, and survives; had it been only an authority, it would have been otherwise. *Dyer* 210.

* If a man hath power of attorney to deliver seisin, and he deliver it otherwise than in his power, it is void; because authorities must be strictly pursued. *Co. Litt.* 258. *a.*

OF POLITICAL.

23. *Nothing shall be void which by possibility may be good.*

If land be given to a man, and to a woman married to another man, and the heirs of their two bodies, this is a present estate-tail, because of the possibility. *See Co. Litt.* 25 *b*; 2 *Bac. Abr.* 548.

† Where I suffer an injury joined with a loss, the law shall give me a remedy and recompense according to my certain and uncertain loss; and even sometimes where the thing is not in being but utterly extinguished. *Hob.* 43.

* Leases for years ought to have a *time certain* mentioned when they are to begin, and when they are to end. Yet if a lease be made for so many years as J. N. shall name, it is not void for uncertainty, for when he has named the years, the lease will be good; and *id certum est quod certum reddi potest. Co. Litt.* 45 *b.*

24. *Ex nudo pacto non oritur actio (a).* [9]

No man is bound to his promise, nor any use can be raised without good consideration.

A consideration must be some cause or occasion which must amount to a recompense in deed, or in law, as money, or natural affection; not long acquaintance, nor great familiarity *(b)*.

(a) An action cannot arise from a naked agreement. Plow. Com. 305.

(*b*) Nor will the consideration of a person adopting the name of the covenantor be sufficient to raise a use. *Hatton's* case, Jenk. Cent. 2, case 60; *Sug. Gilb. Uses*, 456.

*Thus if I bargain and sell all my trees in such a close, or the like, and no consideration is expressed, nothing passes; because there is not *quid pro quo*, which there must be to constitute a good contract. *Dyer* 90 *b*. *See Co. Litt.* 106; 8 *Co.* 80; 1 *Pow. Contr.* 330; 1 *Fonb. Eq.* B. 1 ch. 5. § 1.

25. *The law favours a thing which is of necessity.*

As to pay funeral expenses shall not be said to administer (*a*); to distrain in the night, damage feasant; to kill another, to save his own life, [shall not be said to be] murder.

A servant to beat another to save his master, if he cannot do it otherwise.

To drive another man's cattle amongst mine own, until I come to a place to separate them, is no trespass.

† Necessity is of three sorts, necessity of preservation of life, necessity of obedience, and necessity of the act of God or of a stranger (*b*).

† *First*, of preservation of life.

† If persons be in danger of drowning by the casting away of a boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another, to save his life, thrust him from it, whereby he is drowned; this is neither *se defendendo* (*c*) nor by misadventure, but justifiable. *Bac.*

† So if felons be in a gaol, and the gaol by accident is set on fire, whereby the prisoners get free, this is no escape, nor breaking of prison. 15 *H.* 7. 2. *per Keble.*

† So if upon the statute, that every merchant who sets his merchandise on land without satisfying the customer, or agreeing for it (which agreement is construed to be for a certain quantity) shall forfeit his merchandise, it happens

(*a*) *Godol.* 95. *Off. Ex.* 174. 3 *Bac. Abr.* 22.
(*b*) *Bac. Max. Reg.* 5 T. R. 55.
(*c*) *In self defence.*

that by tempest, a great quantity of the merchandise is cast overboard, whereby the merchant agrees with the customers by estimation, which falls short of the truth, yet the over quantity is not forfeited; where note, that necessity dispenseth with the direct letter of a statute law. 14 *H.* 7. 29. *per Read.* 4 *Ed.* 6. pl. 4. *Ed.* 6. 20, *condic.*

† So if a man have a right to land, and do not make his entry for fear of force, the law allows him a continual claim, which shall be as beneficial to him as an entry; so shall a man save his default of appearance by *cretain de eau*, (the overflowing of waters) and avoid his debt by *duress*. 12 *H.* 4. 20. 14 *H.* 4. 30. *B.* 38. *H.* 6. 11. 28 *H.* 6. 8. 39 *H.* 6. 50. *Co. Litt.* 150 b.

† The *second* necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessary, because the law intends her to have no will, on account of the subjection and obedience she owes to her husband. *Staundf.* 26; Fitz. Abr. tit. *Coron.* 160.

† So one reason among others, why ambassadors are used to be excused of practises against the state where they reside, except it be in point of conspiracy, which is against the law of nations and society, is, because *non constat (d)*, whether they have it *in mandatis (e)*, and then they are excused by necessity of obedience.

† The *third* necessity is of the act of God, *(f)* or of a

(d) It does not appear.

(e) In their instructions.

(f) Although the *act of* God be an expression which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident:* religion and reason, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind blows, nor a "flash of lightning gleams, without the knowledge and guidance of a "superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it, which may, in some instances, border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous. *Jones on Bailments*, 104.

stranger, as if I be particular tenant for years of a house, and it be overthrown by a great tempest or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging to it some cottages which have been infected, whereby I can procure none to inhabit them, or no workmen to repair them, and so they fall down ; in all these cases I am excused in waste : But of this learning when and how the act of God and strangers excuse, there are other particular rules. B. 42 *Ed.* 3. 6. B. Wast. 31. 42 *Ed.* 3. 6. 19 *Ed.* 3. per Th. Fitz. Wast. 30. 32 *Ed.* 3. *Fitzh.* Wast. 105. 44 *Ed.* 3. 31.

† But then it is to be noted, that necessity privileges only *quoad jura privat (g)* ; for in all cases, if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not : For *privilegium non valet contra rempublicam (h)* : And as another says, *necessitas publica major est quam privata (i)* : For death is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life. As if in the danger of tempest, those who are in the ship throw over other men's goods, they are not answerable ; but if a man be commanded to bring ordnance or ammunition to relieve any of the king's towns which are distressed, then he cannot for any danger of tempest justify the throwing of them overboard ; for in that case the speech of the *Roman* holds good, who, when the same necessity of weather was alledged to prevent him from embarking, said, *Necesse est ut eam, non ut vivam (k)*. So in the case put before of husband and wife, if they join in committing treason, the necessity of obedience does not excuse the offence as it does in felony, because it is against the commonwealth.

† So if a fire be in a street, I may justify the pulling down of the wall or house of another man to save the row

(g) As to private rights.
(h) Privilege does not avail against the commonwealth.
(i) The public is greater than the private necessity.
(k) It is necessary that I go, not that I live.

from the spreading of the fire; but if I be assailed in my house, in the city or town, and distressed, and to save my life I set fire to my own house, which spreads and takes hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case; because I cannot rescue mine own life by doing anything which is against the commonwealth: But if it had been but a private trespass, as the going over another's ground, or the breaking of his enclosure when I am pursued for the safeguard of my life, it is justifiable. 13 *H.* 8. 16. *per Shelley.* 12 *H.* 8. 10. *per Brooke.* 22 Ass. *pl.* 56. 6 *Ed.* 4. 7.

† This rule admits an exception, when the law intends some fault or wrong in the party who has brought himself into the necessity; which is *necessitas culpabilis (l).*

† And the common case proves this exception: that is, if a mad man commit a felony, he shall not lose his life for it, because his infirmity came by the act of God. But if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default; for the reason of loss or deprivation of will and election by necessity and by infirmity is all one; for the want of *arbitrium solutum (m),* is the matter; and therefore as *infirmitas culpabilis (n)* excuse not, neither does *necessitas culpabilis (o).* 21 *H.* 7. 13.

* If a man assails me to rob me, and I kill him; or if a woman kill him who assails her to ravish her, it is justifiable. 4. *H.* 7. 2.

* Though regularly the lord can only distrain in the day time, yet cattle damage feasant may be distrained in the night, otherwise they might be gone before they could be taken. *Co. Litt.* 142. (b).

[For more illustrations of this maxim, see *Bac. El.* p. 55. 1 *Blac. Com.* 130.]

(l) A culpable necessity.
(m) Free will.
(n) Culpable infirmity.
(o) Culpable necessity.

26. *The law favours things for the good of the commonwealth.*

As killing of foxes, and the pulling down a house, of necessity to stay a fire (*a*).

† In cases which are for the public good of the people, a man may justify doing a wrong. As in time of war a man may erect bulwarks on another man's lands (*b*).

† A man may justify the razing a house which is burning for the safety of the neighbouring houses. And if a sheriff pursue a felon to a house, and to apprehend the felon, he breaks open the door of the house, he may justify it; because it is for the good of the public, that felons should be taken. But it is otherwise in cases of common arrests for debt, trespass, &c. because these are of a private nature, and not for the good of the commonwealth in general. *Plow.* 322.

† Valuable things for the benefit and maintenance of trade, which by consequence are for the good of the public, and are in any place by authority of law, shall not be distrained: As a horse in an inn, materials in a weaver's shop for making of cloth, sacks of corn in a mill, market, &c. and no man shall be distrained by the instruments of his trade or profession; as the axe of a carpenter, books of a scholar, &c. when other goods may be taken. *Co. Litt.* 47. *a.*

27. *Communis error facit jus (aa).*

As an acquaintance made by the mayor alone, where there be a hundred precedents, is good.

† This is established upon custom; for the law so favours the public good, that it will permit a common error to pass for right: As in cases of common recoveries, first

(*a*) Dyer, 36.
(*b*) Dyer, 60. *Plowd.* 322.
(*aa*) *Common error becomes right.* 4 Inst. 240

had upon feigned and unlawful ground, which, nevertheless having been used a long time, they having been taken and allowed by divers persons well learned, as law, are esteemed good. And that a common recovery bars an estate-tail, is not to be disputed; because a great part of the inheritances of the kingdom depends upon it. *Plowd.* 33. b.

28. *And the law favours things which are in the custody of the law.*

Goods taken by distress, shall not be taken in execution for the debt of the owner thereof.

† Tenant for life the remainder to the right heir of *J. S.* tenant for life is disseised, and the descent cast, and afterwards *J. S.* dies, and after that the lessee for life dies, the entry of the right heir of *J. S.* is lawful; for this is commonly in the custody of the law, which preserves it lawfully and without any violence or destruction. 1 *Co.* 134. b.

† Where beasts are impounded in the same land for damage-feasant, the lord of the land cannot distrain them for rent, because they are in the custody of the law. Br. tit. Distress.

29. *The husband and wife are one person.*

They cannot sue one another, nor make any grant one to another (*a*). And if a woman marry with her obligor, the debt is extinct (*b*), and she shall never have any action if another were bound with him: for by the marriage the action is suspended (*c*); and an action personally suspended against one is a discharge to all.

(*a*) *Litt. Sect.* 168. Yet he may give to a trustee for her benefit, and the gift will be good. So he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, to her use. *Co. Litt.* 112 a. *Hargr.* n. *Co. Litt.* 3 a (1). 1 *Rop. Husb. and Wife*, 53. *Wing. Max.* 765.

(*b*) *Co. Litt.* 264 *b*; and *Butler's* notes (1) and (2).

(*c*) But if the husband, *before* the marriage, give a bond to his *in-*

An obligation with a condition to enfeoff a woman before such a day, and before the day the obligor takes her to wife, the obligation is forfeited, because he cannot enfeoff her; but he may make a lease for years with a remainder to his wife.

When a joint purchase is made during the marriage, every one shall have the whole *(d)*.

When a joint purchase during the marriage is made, and the husband sell, the wife shall have a *cui in vita (e)* for the whole against both; and on a feoffment made to one man and his wife, and to a third person, the third person shall have one moiety.

[11]

* If a joint estate in land be made to a man and his wife and a third person, the man and his wife shall have but a moiety, and the third person the other moiety: So, if it be given to a man and his wife and two others, they shall have but a third; for they are but one person in law. *Litt.* § 665; *Co. Litt.* 187 *a.*

† A feoffment is made to a man and woman and their heirs, with warranty, they intermarry, and after are impleaded and recover in value, moieties shall not be between them; for though they were sole when the warranty was made, yet at the time when they recovered and had execution, they were husband and wife, at which time they cannot take by moieties. *Plowd.* 483.

tended wife, with a condition to avoid it, if *he leave her a certain sum of money at his death*, the obligation would not be dissolved by their marriage; for the engagement never ripened into a duty, during the husband's life, and it could not have been released by him. *Smith* v. *Stafford*, Hob. 216; *Clark* v. *Thompson*, Cro. Jac. 571; *Tylle* v. *Peirce*, Cro. Car. 376; *Gage*, v. *Acton*, 1 Ld. Raym. 515; *Milbourn* v. *Ewart*, 5 Term. Rep. 381. 384. Thus it appears, that the express agreement of the parties created a right not inconsistent with the rules of marriage; so that, although the right be *suspended*, it is *not extinguished* by it. 2 *Rop. Husb. and wife*, 77.

(d) That is, the husband and wife will be joint-tenants, and the survivor will have the whole.

(e) *In whose life.* See F. N B. 193.

† At the common law, a man during the coverture could neither in possession, reversion or remainder, limit an estate to his wife: But by st. 27 *H.* 8. c. 10. a man may covenant with others to stand seised to the use of his wife, or make any other conveyance to the use of his wife; but he may not covenant with his wife to stand seised to her use: for they are one person in law. A man may devise lands by will to his wife, because the devise does not take effect till after his death. *Co. Litt.* 112.

† An action of debt lies against the husband for goods delivered or sold to the wife, for the law presumes they must come to the use and possession of the husband; and the husband and wife are but one person. *Pract. Reg.* 102. But the wife may not make any contract or agreement without the consent of the husband; (except it be for necessary apparel, goods for her family, &c.) and if she bargain and sell any goods, if the buyer knows her to be a feme covert, the contract shall be void; unless it be for such things as she usually trades for, by the consent of her husband. 2 *Inst.* 713.

† If a woman sole be indebted, and then take husband, it is now become the debt of the husband and wife, and both are to be sued for it; but after the death of the wife, the husband is not liable; unless there be a judgment obtained against them both during the marriage. *Pract. Reg.* 105.

† A wife can never answer in any action without her husband: And if upon an action of trespass the wife comes in upon a *cepi corpus*, and the husband does not appear, she must be set at large, without any mainprise, till her husband does appear; but he appearing may answer without her; and therefore a protection cast by the husband serves for the wife also. *Finch's Law* 41.

† A man must answer for the trespasses of his wife; and if a feme covert slander any person, the husband and wife must be sued for it. But for scandalous words against a man and his wife, the husband may prosecute one action

alone for his slander, and afterwards join in an action with his wife for her's. *Style's Rep.* 113.

† If a married woman be assaulted and beaten, if the husband is thereby deprived of her service or conversation, he alone may commence an action of trespass. 3 *Co.* 113.

† A husband has power over his wife's person; but if he threatens to kill her, &c. she may make him find security for the peace. *Fitz. N. Br.* 80.

† The husband is the *head of the wife*, and all things which are the wife's are the husband's; so that by marriage with a woman who has a term of years, the husband is possessed of it in her right, and has power to dispose of it; and if she have goods and chattels, by the intermarriage, they immediately become the husband's (*f*)

† The husband has power to dispose of things in action; and his release of an obligation made to the feme, or where goods were taken from her whilst she was sole, shall be good against the wife; but if he die without making such release, the wife shall have an action upon the obligation, and not the executors of the husband. 39 *H.* 6.

† And if an obligation made to a feme, become payable during coverture, and afterwards the wife die, the husband shall have an action of debt upon it; because it was

(*f*) *Co. Litt.* 351 a. But the freehold or inheritance of the wife is subject to other rules; for the husband, by the marriage, does not become absolute proprietor of the freehold or inheritance; although, as the governor of the family, he is so far master of it, as to receive the profits of it during her life; but he has no power to make an absolute sale of it without her consent. 1 Bac. Abr. 476. *Baron and Feme* (*C*) 1. Although a man who marries a woman seised in fee, gains a *freehold* in right of his wife, yet it must be pleaded, that the husband, and wife, in right of the wife, were seised in *fee*, not of freehold merely; and if he state that he is seised *in his demesne as of freehold in right of his wife*, it will be bad on a special demurrer. *Polybank* v. *Hawkins*, Dougl. 329. So in *Catlin* v. *Milner*, 2 Lutw. 1422-1425, where it is stated, that the husband alone was seised *in his demesne as of fee* in right of his wife, it is well held not to be good pleading: for they are both seised in right of the wife: and so are all the precedents. *Wms. n.* 1 *Saund*, 253.

a duty to the feme, and a thing in action before marriage; but it is otherwise where rent is in arrear. F. N. B. 121.

† Where a wife has a term of years the husband cannot devise it to another by will, or grant a rent charge (*g*) out of it; for she had an estate in it before, and so has at the time of his death; and she surviving, is remitted to the term, whereupon she shall avoid the rent-charge. *Plowd.* 418.

† If husband and wife bargain and sell the wife's lands by indenture, and the vendee grant them a yearly rent out of it, her acceptance of this rent, after her husband's death, does not bar her of the lands, although the acceptance be an agreement to the bargain; the bargain being but a contract is the bargain of the husband only; for a wife is *sub potestate viri* (*h*); and therefore it is that the judges, when a woman is to acknowledge a fine of lands, do examine her privately, whether she be willing to do it, or come by compulsion of the husband. *Off. of Exec.* 210.

[From the practice in England, of taking the privy examination of the wife, on fines and recoveries, originated the law of Virginia in relation to conveyances by husband and wife, where there never were any fines and recoveries. *See* 2 *Hen. Stat. at Lar.* 317; 1 *Rev. Code of* 1819, *p.* 366, *note*:]

† For this reason the writ, *cui in vita* (*i*), is given to the wife by law, for the recovery of her land after her husband's death, being aliened by him. And in many cases, the law helps the wife, because she is under the power of her husband: As if baron and feme, in right of the wife, have title to enter into lands, and the tenant dies seised, the entry of the husband upon the heir, who is in by de-

(*g*) *Co. Litt.* 184 *b.* Her right being paramount, and her interest not having been displaced, she will be entitled to the term discharged from the payment of the rent, yet he might have granted away the term itself, 1 *Bac. Abr.* 476. *Baron and Feme* (C. 2). 1 *Rop. Husb. and Wife*, 178. *Harg.* n. *Co. Litt.* 184 *b.* (6).

(*h*) *Under the power of her husband.*

(*i*) In whose life.

scent is taken away; but if the husband die, the wife or her heirs may enter upon the issue; for the laches of the husband shall not turn to the prejudice of the wife or her heirs. *Litt. Ten.* 235. But it is otherwise if the wrong be done to the feme before marriage: And if it be for the performance of a condition annexed to the estate; as where a feoffment is made to the feme reserving rent, and for default of payment a re-entry, in that case the laches of the husband shall bar the wife for ever. *Co. Litt.* 24.

30. *All that a woman has appertains to her husband.*

Personal things, and things absolutely real, as lands, rents, and so forth, or chattels real, and things in action, are only in her right; notwithstanding chattels real, and things in action, he may dispose of at his pleasure *(a)*, but not will nor charge them; and he shall have her real chattels, if he survive. Of things in action, the woman may dispose by her last will, and she may make her husband her executor, and he shall recover them to the use of the last will of his wife *(b)*.

If a lessee for years grant his term to a man, or woman, and to another, they are joint-tenants: but if goods be given to her and to another, her husband and the other are tenants in common.

The husband may release an obligation, or trespass for goods taken when his wife was sole, and it shall be good against the woman if he die; but if he die without making any such release, the woman shall have the action, and not the executor of her husband.

[12] The woman surviving, shall have all things in action; or her executors, if she die. *Co. Lit.* 351 *a. But. n.* (1)

(a) 1 *Bac. Abr.* 476. 3 *Bac. Abr.* 65. 2 *Bl. Com.* 435.

(b) If the husband survive his wife, then he is entitled to administration to her effects, and he will thereby become entitled to all her personal estate, which continued in action or unrecovered at her death. 2 *Bl. Com.* 435. *Toll. Ex.* 84. 224. 1. *Rop. Husb. and wife*, 203.

The husband shall be charged with the debts of his wife (*c*) only during her life.

* A feme covert cannot make an executor without the consent of her husband; and the administration of her goods of right belong to him. 4 Co. 51. *b.*

[See further as to the property of husband and wife, *Hargrave's and Butler's, Co. Litt.* 3. *a. note* (1); 32. *a. n.* (10); 325. *b.* n. (1); 351. *a. n.* (1)].

31. *The will of the wife is subject to the will of her husband.*

Note. A feoffment made to the wife, she shall have nothing if her husband do not thereto agree. *See Co. Litt.* 352, 356.

* If a feme sole devise lands to a man and afterwards take him to husband and dies; the heirs of the wife shall have the land; because after marriage the will of the wife is in judgment by law restrained, and subject to that of her husband. 4 *Co.* 91. *a.*

* Though a feme covert may purchase without the consent of her husband, yet he may disagree thereto; and if he agree to it and die, she may nevertheless waive the purchase, and so may her heirs if she have not agreed thereto, for she had no free will. *Co. Litt.* 3. *a.*

MORAL RULES.

32. *The law favours works of charity, right and truth, and abhors fraud, covin, and uncertainties which obscure the truth; contraries, delays, unnecessary circumstances and such like. Dolus et fraus una in parte sanaridebent* (*a*).

* *The law favours works of charity;* therefore *charitable* uses are not taken away by stat. 23. *H.* 8. c. 10,

(*c*) Contracted before marriage. After marriage the reasonable debts she contracts are *his* debts.

(*a*) *Deceit and fraud should be remedied on all occasions.*

though the words of the statute are general, but only *superstitious* uses. 1 *Co.* 24. *a.*

* *It favours right:* so that no act (even though under pretext of religion) shall work a wrong to a stranger who has right, and bar him of his entry; therefore if disseisor have issue and enter into religion, the disseisee shall not be barred of his entry. *Co. Litt.* 248, b.

* If tenant for life plead covenously to the disinheritance of him in reversion, it is a forfeiture, for the law abhoreth fraud. *Co. Litt.* 252. *a.*

* If a man make a lease for so many years as *A.* shall live, it is void for uncertainty. *Co. Litt.* 45. *a.*

A grant of all his woods in Black Acre, which may be reasonably spared, is a void grant, if it be not reserved to a third person, to appoint what may be spared.

[13] A feoffment made in fee of two acres to two men, *habendum* (*b*) one acre to one, and the other acre to the other, this *habendum* is void.

33. *No man can take advantage of his own wrong.*

If a man be bound to appear at a day, and before the day the obligor put him in prison, the bond is void. *See Co. Litt.* 208. a.

† One in execution escapes, and the gaoler takes him again, the party, if he will, may have him to remain in prison in execution for him still, for the escape is his own wrong; and if one in prison upon execution escape, and he be taken, he shall not bring an *audita querela* to discharge himself of his imprisonment; for he shall not take advantage of his own wrong. 3 Co.

† *A.* devises lands to *B.* until eight hundred pounds be levied for his daughter's portion; his son and heir enters, and conceals the will, whereupon he receives the profits before the will is discovered; but afterwards the devisee enters and receives the profits, until they amount to six

(*b*) *To have.*

hundred pounds; the heir is to supply the rest, for he shall not take advantage of his own wrong. 4 Co. 63.

† If lessor and lessee for years join in the cutting down of timber-trees, the lessor shall not punish the lessee in a writ of waste, and take advantage of his own wrong. *Perk.* 41.

34. *Lex neminem cogit ad impossibilia, &c.* (*a*).

The law compels no man to shew that which by intendment he does not know: as if a servant be bound to serve his master in all his lawful commands, it is a good plea, to say, he served him lawfully.

A covenant to make a new lease upon the surrender of the old lease, and afterwards the covenantor makes a lease by fine, for more years, to a stranger, the covenant is broken, although the lessee did not surrender, which by the words ought to be the first act, because the other had disabled to take, or to make.

† If a man be bound in an obligation, &c. with condition, that if the obligor go from the church of St. Paul's, London, to the church of St. Peter's at Rome, within three hours, this condition is void and impossible, but the obligation may be good. *Co. Litt.* 206.

† And so it is of a feoffment upon condition, that the feoffee shall go as aforesaid, the feoffment is absolute, and the condition void; because it is a condition subsequent. But if there be a condition precedent impossible, no estate or interest is acquired thereby (*b*). *Co.* ib.

† If a lease be made for forty years upon condition that the lessee dwell upon the lands the whole term, and he die at the end of ten years, the executors shall enjoy the land, because the condition is become impossible. *Dod.* 37 *Eliz.*

(*a*) *The law does not compel any man to do what is impossible.* 5 Co. 21.

(*b*) In case of a feoffment in fee, with a condition subsequent, which is impossible, the estate of the feoffee is absolute; but if the condition precedent be impossible, no estate or interest will arise. *Co. Litt.* 206 b.

If a man be bound by recognizance or bond, with condition for his appearance the next term in such a court, and before the day the conusee or the conusor die, the obligation is saved.

† If a deed remain in one court, it may be pleaded in another court, without shewing forth; for the law does not compel any one to impossibilities. And if a lessee covenant to leave woods, &c. in good condition, and during the term they are blown down by winds, the lessee shall not be sued, because it is impossible he should perform his covenant. 1 *Co.* 98.

LAW CONSTRUCTIONS.

35. *The law expounds things with equity and moderation, to moderate the strictness. It is no trespass to beat an apprentice with a reasonable correction, or to go with a woman to a justice of peace, to have the peace of her husband against the will of her husband, which equity* [14] *restrains the generality, if there be any mischief or inconvenience in it: as if a man make a feoffment of his lands in C. and with common in all his land, the common shall be intended within his lands in C. and not in his other lands he shall have elsewhere.*

36. *Every act shall be taken most strictly against him who made it.*

As if two tenants in common grant a rent of ten shillings, this is several, and the grantee shall have twenty shillings (*a*); but if they make a lease, and reserve ten shillings, they shall have only ten shillings between them.

(*a*) *Lord Nottingham's MS. n. Co. Litt.* 267 *b.* (1). *Finch's Law*, 63. Perhaps this doctrine may be considered a mere quibble in the present day. If the recital stated the intention to be only to grant a rent of ten shillings, that would counteract the operation of this rule of law. Vide *Shelley* v. *Wright*, Willes, 9. *Henn* v. *Handson*, 1 Sidf. 141. *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235. Because it is a maxim of

So an obligation to pay ten shillings at the feast of our Lord God (*b*), it is no plea to say that he did pay it; but he must shew at what time, or else it will be taken he paid it after the feast. *See Co. Litt.* 303. *b.*

† If tenant in fee make a lease for life, without expressing for whose life, it shall be intended for the life of the lessee, and shall be taken strongly against the lessor; but if tenant in tail make such a lease, it shall be taken for the life of the lessor, because otherwise it would work a wrong to the reversioner. *Co. Litt.* 42 a (*c*).

† When a grant is uncertain, and the words of it are ambiguous, the grant shall be taken most strongly against the grantor. As if a man grant an annuity out of land, and he has no land at the time of the grant, yet the grant shall charge his person. Trin. 9 *H.* 6. And if a deed be good for some parcels, and for some parcels not, that which is for the advantage of the grantee shall stand good.

† If a man give lands to another *et hæredibus* (*d*), it shall be a fee-simple without the word *suis* (*e*), and though he do not give him a fee-simple expressly (*f*). If I give lands to *A. B.* and his heirs male, this will be a good fee-simple, and

the highest antiquity in the law, that all deeds shall be construed favourably and as near the apparent *intention* of the parties as possible; for where the intention is clear, too minute a stress ought not to be laid even on the strict and precise signification of words. 4 *Cru. Dig.* 292, 293. If such an unjust advantage were attempted to be taken by the grantee of the rent, it seems clear that equity would restrain him, and oblige him to pay the costs. However, when tenants in common grant a rent charge, it is prudent to add a proviso and declaration, that the grantee is only to receive the sum actually intended, or otherwise to make a conveyance to uses, to the end and intent that the person to have the rent may receive it, and subject thereto to the use of the grantors, as tenants in common in fee.

(*b*) *Christmas.*

(*c*) *Perk.* s. 104.

(*d*) *And to heirs.*

(*e*) *His.*

(*f*) 1 *Plow. Com.* 28 a. 29. Lord Coke says, it is safe to follow Littleton, and add *suis*. *Co. Litt.* 8 *b.*

the word "males" is void *(g)*. And if a man give lands to one *et filio suo primogenito* *(h)*, and he has no son at the time of the gift, but afterwards he has a son, that son shall have the land by way of remainder; for the law construes the limitation strong against the maker *(i)*.

† If I sow all my land with corn, and then make a lease of it for years, the corn belongs to the lessee, if I except it not. 32 *H.* 6.

† If I give a horse to *A. B.* being present, and say unto him, *A. C. take this*, it is a good gift, though I call him by a wrong name: but so it would not be if I delivered it for the use of *A. C.* where I meant *A. B.* So if I say to *A. B. Here, I give you my ring, with the ruby*, and deliver it with my hand; though the ring bear a diamond and no ruby, this is a good gift, for these shall be taken strongly against the giver. Bac. Max. 87.

† But though grants are taken strongly against the makers, yet no wrong must thereby be done, as already observed. And a man may not be obliged by his own act to do some things which are against law: as a dyer was bound not to use his trade for two years, and the obligation was held against the common law *(k)*. And if a husbandman be bound not to till or sow his ground, the obligation is contrary to the common law, and void. 11 Co. 53.

(*g*) *Co. Litt.* 13 a; *Plowd.* 18. *Bac. Max.* 12.
(*h*) *And to his first-born son.*
(*i*) *Plowd.* 29.
(*k*) *Vide* note, *infra*, *Condition*, * 78.

37. *He who cannot have the effect of the thing, shall have the thing itself.*
Ut res magis valeat quam pereat (a).

As if a termor grant his term *habendum immediate post mortem suam (b)*, the grantee shall have it presently (*c*).

(*a*) *That a thing may rather be good than void.*

(*b*) *To have immediately after his death.*

(*c*) *Germain* v. *Orchard*, 1 Salk. 346. 14 Vin. 157, pl. 14. 3 Bac. Abr. 399. The reason assigned by the court is, because by the grant of lands in the premises to the grantee, his executors, administrators, and assigns, the whole term of years is transferred, and since by the premises the whole term passed presently, but by the *habendum* not till after the death of the grantor; *ex consequentia* the *habendum* was repugnant to the premises, and void; and this judgment was affirmed in the House of Peers.

This judgment partakes a little of legal sophistry, and it seems would not in the present day be followed; for though the *habendum*, as well as all other parts of a deed, are generally taken most strongly against the grantor, and most in advantage of the grantee; yet it nevertheless must be construed as near the intention of the parties as can be. Shep. Touch. 101. and see Litt. s. 298, and the comment. And as it seems clear that an assignment of a term may be made on a contingency, it therefore follows, as a necessary consequence, that it may be assigned from a certain day to come. *Welcden* v. *Elkington*, Plow. Com. 524.

There are many maxims of law, that deeds, especially such as execute mutual agreements for valuable consideration, should be construed *liberally*, *ut res magis valeat*, according to the INTENT, which ought always to prevail, unless it be contrary to law. A strained construction should not be made to overturn the *lawful intent* of the parties. Lord Mansfield. If *we* can support the *intention*, by *any* construction, we will do it. Mr. Justice Denison. *Wright*, ex dem. *Plowden* v. *Cartwright*, 1 Burr. 285, 286.

It seems clear there would be relief in equity against such a construction, as that mentioned in the text.

To avoid this question, when an assignment is intended to be made from a future day, it should be made to a trustee in trust for the grantor, till the commencement of the intended time, and then in trust for the assignee, his executors, &c. for the residue of the term.

Assignment of terms for years from a future period, as from Michaelmas day next, are not uncommon, and though they are not technically correct, according to the old cases, yet no objection is raised to

† Tenant in tail makes a lease for life, this shall be construed for the life of the lessor (*d*).

† An annuity granted *pro consilio impendendo* (*e*), or a feoffment for instructing a son, or for paying a sum of money, is a condition without conditional words; because otherwise, the party would be without remedy. Mar. 141, 142.

38. *When many join in one act, the law says it is the act of him who could best do it, and that the thing should be done by those of best skill.*

[15] As if the disseisee, and the heir of the disseisor, who is in by descent, join in a feoffment, this shall be the feoffment of the heir only, and the confirmation of the disseisee.

And the merchant shall weigh the wares, and not the collectors (*a*).

† If a condition be, that the obligee shall carry to the shop of the obligor (being a tailor) three yards of cloth, which shall be there cut out, and then that the obligor should make the obligee a coat of it, the obligor, viz. the tailor, is bound to cut it out (*b*).

† Issues joined shall be tried by those who have most skill, viz. issues upon points of law, that is, demurrers shall

the title on that account. But when an assignment is to take effect immediately in interest to avoid the above objection, it is prudent to make the *habendum* "from the day next before the day of the date," or "henceforth."

(*d*) *Litt.* s. 283. *Co. Litt.* 42. So if lessee for term of his own life makes a lease generally *with livery*, this the law construes an estate for his own life only. *Co. Litt.* 183 a. 2 Bac. Abr. 550, *Estate for Life*, &c. (A). 4 *Cru. Dig.* 295. 348.

(*e*) *For giving his advice.*

(*a*) The author probably had in his mind, *Reniger* v. *Fogossa*, 1 Plowd. Com. 1.

(*b*) Finch's Law, 61. For the principal point is the making of the coat, and before that can be done, it must of necessity be cut out, and who shall do this is not expressed, and therefore the law appoints the tailor to do it, because he has the greatest knowledge and skill to do it, and it belongs to his business. *Plow. Com.* 15 a.

be argued before, and adjudged by the judges learned in the law, &c. 4 *Eliz.* 230 b.

† Disseisin of an office in the Common Pleas, or erasure of a record there, shall be tried by the filacers and attornies attending in that court. 11 *E.* 4. 3 b; 2 *Mod.* 304.

39. *When two titles concur, the elder shall be preferred.* 2 Inst. 714.

† A disseisor lets the land to the disseisee for years or at will; now if he enters, the law will say, that he is in on his ancient and better title *(a)*.

* When one mortgages lands, and afterwards grants a lease of them, and gives the lessee possession, the mortgagee, if he did not assent to the demise, may recover the premises, by ejectment against the lessee. *Doug.* 21.

40. *By an acquittance for the last payment, all other arrearages are discharged.*

* If a tenant be in arrear twenty years, and his landlord give him a receipt for the last rent, all arrearages shall be held to be paid; and no proof shall be admitted to the contrary. *Co. Litt.* 373. a.

* Though but part of a sum be paid, yet if acquittance be given for the whole, it is a discharge. Ibid.

41. *One thing shall enure for another.*

If the lessor enfeoff the lessee for life *(aa)*, it shall be taken for a confirmation. See *Co. Litt.* 30. *b.*

* A man having a rent charge issuing out of the wife's lands, releases it to the husband and his heirs; yet the husband shall not have it, but it shall enure by way of extinguishment. *Plowd.* 372.

(a) But the entry must be *congeable*, and the lease must not be by indenture or matter of record, because that would estop the disseisee and he would not be *remitted*. Litt. s. 693. 694. 696. Perk. s. 159.

(aa) Without any words of limitation.

42. *In one thing, all things following shall be included, in granting, demanding, or prohibiting.*

If a man make a grant of land, and except a close of wood out of it the law will give him a way to the wood (*a*).

† As confederacy and combination to execute any unlawful act is punishable by law, before the unlawful act is executed, the law punishes the combination and confederacy to prevent the unlawful act; and therefore the commission of oyer and terminer gives power to the commissioners to inquire of all combinations, confederacies, &c. 9 *Co.* 57.

In action of waste, a writ of estrepement will lie; and when it comes to the sheriff, by virtue of it, he may resist those who will make waste; or if he cannot otherwise prevent it, he may imprison them: And if it be necessary, he may take the *posse comitatus* for his aid; though the words of the writ are only, that he shall personally go to the messuage and take order that no waste be done, hanging the plea; because when any thing is commanded, that is also commanded by which we may come at it. 5 *Co.* 115.

† If a man grant to me all his trees growing in his woods, it is implied that I may come upon the ground and cut them down, and carry them through all his land (though his grass receive injury by the carriage) and he shall not have a writ of trespass against me; for trees are such things, that if they are not carried by carts, I cannot have them to make my best profit of them: and a man shall always justify the necessary circumstance where he has title to the principal thing (*b*).

† In case a lessor upon his lease excepts the trees, and afterwards has an intention to sell them, the law, as incident to the exception, gives to him and those who are

(*a*) *Perk.* s. 110. *Finch's Law*, 63. *Wms.* n. 1 *Saund.* 322 *b.* (6). And whenever the law gives any thing, it gives also a remedy for the same; *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest. Co. Litt.* 56 a.

(*b*) *Plow. Com.* 16. *Finch's Law*, 63.

willing to buy them, power to enter and shew and view the trees; because without entry, they cannot be viewed; and without view, they cannot be bought. 11 *Co.* 52 a.

† If a man has mines hidden within his lands, and make a lease of the said lands and all the mines in the same, there the lessee may dig for them; for *quando aliquis quid concedit, &c. (c).* But if a man lease his land to another, in which there is a hidden mine, but mines are not mentioned in the grant, he cannot dig for it, if he do it is waste; though if he make a lease of all his lands and all the mines, it is otherwise for the reasons aforesaid. 5 *Co.* 12.

† A tenant at will sows corn on the ground, and the lessor ousts him, he shall have free entry, egress and regress, to cut and carry away the same; for when the law gives any thing to any one, it gives implicitly whatsoever is necessary for the taking and enjoying of the same: and if the lessee be disturbed in carrying his crop, he may bring an action upon the case and recover damages. 1 *Inst.* 56.

† If land be granted to a man, the law allows him a way to it without being expressly mentioned. And a landlord may enter the house and lands of his tenant to view repairs, &c.

43. *A man cannot qualify his own act.*

As to release an obligation until such a time.

† Upon the grant of the reversion of three acres, and the tenant attorns for one, this is good for all three. *Fitzh. Abr. tit. Variance,* 43.

* If an obligee release his debt till Michaelmas it is good forever. *Co. Litt.* 274. b.

44. *The construction of the law may be altered by the special agreement of the parties.* [16]

If a house be blown down with the wind, the lessee is

(c) *For when any one grants any thing, &c.*

excused in waste; but if he have covenanted to repair it, there an action of covenant lies by the agreement of the parties (*a*). *See Co. Litt.* 53.

* If two joint tenants exchange with one another, they would, by construction of law, hold the exchanged lands jointly; but if the exchange expresses that they shall hold in common, it shall be so. *Co. Litt.* 51. a.

45. *The law regards the intent of the parties and will imply their words thereunto.*

And that which is taken by common intendment shall be taken to be the intent of the parties: And common intendment is not such an intendment as stands indifferent, but such an intent, as has the most vehement presumption. All uncertainty may be known by circumstances, every deed being made to some purpose, reason would that it should be construed to some purpose; and a variance shall be taken most beneficial for him to whom it is made, and at his election.

46. *An intendment of the parties shall be ordered according to law.*

If a man make a lease to a man and to his *heirs* for ten years, intending his heirs shall have it if he die, notwithstanding the intent, the executors shall have it.

† Two joint-tenants of an acre of land, change it with a stranger, they shall be joint-tenants of the land exchanged; but if the exchange be to have the acre in common between them, this is good. *Co. Litt.* 188, 190.

[17] 47. *Qui per alium facit, per seipsum facere videtur (aa).*

A promise made to the wife in consideration of a thing to be performed by her husband, if he agree, and perform

(*a*) *See* the first note to *Covenants*, post * 85.

(*aa*) *He who acts by another is held to act by himself.* 1 Inst. 258.

the consideration, in an action of the case, he shall declare the assumption was made to him.

And if my servant sell my goods to another, in an action of debt I shall suppose he bought them of me.

† A servant by command of his master may make claim of land for his master; and if the servant do all he was commanded, and which his master ought to do, there it is as sufficient as if his master had done it himself. 1 *Inst.* 258.

† If I declare by my last will, that *A. B.* shall alien my land, and he do so, it is my alienation by him; and if I give authority to my bailiff to sell my sheep, or other cattle, and he do so, it is my sale by him. *Plowd.* 475.

† If a man have a bailiff or servant, who is known to be his servant, and he send him to fairs and markets to buy or sell, his master shall be charged with the payment, if the thing which is merchandised comes to his use; and so it is if a man sends his boy to market, *consideratis considerandis*. And if a man make another his factor to buy things for him, if he buy merchandise of any, the master shall be charged by his contract, though the goods come not to his possession. 4 *E.* 2.

† If a servant sell me cloth, and warrant it to be of a certain length, the action lies against the master only, and not the servant: And if a surgeon undertake the cure of a person, and by sending medicines by his servant the wound is hurt and made worse, the patient shall have an action against the master and not against the servant. If a receiver make a deputy, the writ of account shall be brought against the receiver only, because the money was received to his use. 18 *H.* 8.

† But though things done by another are, as it were, done by a man's self; yet corporal and personal things cannot be done by another; as suit of court cannot be done by any other but the tenant himself. 7 *H.* 4.

CUSTOMS.

48. *Consuetudo est altera lex (a).*

Customs are of two sorts: General customs in use throughout the whole realm, sometimes called Maxims; and Particular customs used in some certain county, city, town, or lordship, whereof some have been specified before, and some follow here, and where occasion is offered.

GENERAL CUSTOMS.

Every custom is a sufficient authority to itself; and what
[18] *is a custom, and what is not, shall always be determined by the judges, because they are known to none but to the learned.*

A custom shall be taken strictly.

A particular custom, except the same be a record in some court, shall be pleaded and tried by twelve men.

† When a reasonable act once done, was found to be beneficial and agreeable to the people, then did they use and practice it often, and so by the reiteration of the same, it became a custom; which being practised time out of mind without interruption, for the quiet and by the approbation of the people, obtained the force of a law.

† The general customs used throughout all England, is the common law; for *Coke* says, the common law is a common opinion generally received. *Plowden* says it is nothing else but common use. And according to *Finch*, the common law is a law used by prescription throughout

(a) *Custom is another law.* 4 Co. 21. *Consuetudo tollit communem legem.* Co. Litt. 33 b. The unwritten law is that which usage has approved: for all customs which are established by the consent of those who use them, obtain the force of a law. *Just Inst.* 1. 2. 9. See also *Vinnius*, 24, 25. No custom can prevail against right reason, and the law of nature. The will of the people is the foundation of custom: but if it be grounded not upon session, but error, it is not the will of the people. *Taylor's Civil Law* 245. 247. 2d edition.

the kingdom: And the best expounder of the law is custom.

† The different customs of manors and places have chiefly arisen by the several nations who have had government over this kingdom, the Britains, Romans, Saxons, Danes and Normans, who have left behind them part of their languages, and part of their usages.

† Acres of land are to be accounted according to the measure of the country: and if a man bargain and sell so many acres of wood, they shall be measured according to the usage of that country (*a*).

CHAP. II.

STATUTES.

The last ground of the laws of England stands in divers statutes made by our sovereign lord the king and his progenitors, and by the lords spiritual and temporal, and the commons, in divers parliaments, in such cases where the former laws seemed not sufficient to punish evil men, and to reward the good.

Of general statutes, the judges will take notice, if they be not pleaded; but not of special or particular (*aa*).

(*a*) See further concerning *customs*, Hargr. n. Co. Litt. 110 b. (1), (2) 115 a (8), (9). 2 Bac. Abr. 232. 7 Bac. Abr. 441. Gwil. edit. 7 Vin. Abr. 164. 19 Vin. Abr. 511. 5 Supp. Vin. Abr. 66. Com. Dig. *Custom*, in index. 3 Cru. Dig. 468. Robins Gav. 32. 225.

(*aa*) As to the distinction between *public* and *private* acts, and the rules of evidence in relation to them, *see Phillips on Evid.* 309, 310, 384, *4th edit.*: *Gilb. Evid.* 12, 45, 46, *4th edit.* 10, 39, 40, *Sedwick's edit.*; *Bull*, N. P. 222, 224; *Peake's Evid.* 26, 2d *edit.* 29, 4th *edit.*; *Hargr. n. Co. Litt.* 98 b. [1]; 2 *Saund.* 155, *Wms. note*; *Doug.* 97. *notes*; 2. T. Rep. 575; 5 *Cru. Dig.* 4: 12 *East* 479; *Sug. Vend.* 640, 5th *edit.*; 1 *Bl. Com.* 85; 1 *Burn.* Just. XXIV: *Co. Litt.* 381, *a note.*

[By the laws of Viginia, private acts of assembly may be given in evidence, without pleading them specially. 1 Rev. Code of 1819, p. 510 §92.]

All acts of parliament, as well private as general, shall be taken by reasonable construction, to be collected out of the words of the act only, according to the true intention and meaning of the maker (*b*).

[19] *Four lessons to be observed, where contrary laws come in question.*

1. The inferior law must give place to the superior.
2. The law general must yield to the law special.
3. Man's laws to God's laws.
4. An old law to a new law.

And oftentimes all these laws must be joined together to help a man to his right: as if a man disseised, and the disseisor made a feoffment to defraud the plaintiff, in this case it appears, that an unlawful entry is prohibited by the law of reason.

But the plaintiff shall recover the double damage, and that is by the statute of 8 *H.* 6. And that the damages shall be assessed by twelve men: that is, by the custom of the realm: And so, in some cases, these three laws do maintain the plaintiff's right.

And these laws concern either men's possessions or the punishment of offences.

And so much shall be sufficient to be said touching common law, customs, and statutes.

(*b*) The collection 6 Bac. Abr. 384. *Statute* (1) 5. is an admirable commentary on our author, and shews what a masterly view he took of the subject. *Vide* 1 Bl. Com. 88 and Christian's note. Lord Bacon's Maxims, Reg. 12. Tracts 75. Barrington's Observations on the Ancient Statutes, 523. 5th edition.—The rule above laid down, by the author, for the construction of statutes, applies to *remedial* statutes only; for *penal* statutes are construed strictly, and according to the letter, thus the stat. 1 *Edw.* 6. c. 12, enacting that persons convicted of stealing *horses* should be guilty of felony without clergy, was held not to extend to the stealing of *one horse*, though evidently within the meaning of the legislature. *Bac. El.* c. 12.

CONCERNING POSSESSIONS. [20]

The difference between possession and seisin is; lessee for years is possessed, and yet the lessor is still seised; and therefore the terms of the law are, that of chattels a man is possessed; whereas in feoffments, gifts in tail, and leases for life, he is described as seised.

CHAP. III.

OF POSSESSION IN FEE-SIMPLE.

Tenant in fee-simple is he who has lands or tenements to hold to him and his heirs for ever *(a)*. It is the best inheritance a man may have; he may sell, or grant, or make his will of those lands.

And if a man die, they descend to his heir of the whole blood. [*See further as to the law of descents, post. ch.* IV., and 2 *Bl. Com.* 104.]

[*(a)* At the common law, if lands were conveyed by *deed;* without naming the *heirs* of the grantee, he would have only an estate for life, *Co. Litt. sec.* 1. *Perk* s. 243; but a *devise* to a man forever, would create a fee-simple, *Co. Litt.* 9 b; 27, *a.* The law, in this respect, was altered in Virginia, by act of 1785, which declares that "every estate in lands thereafter granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law." *See* 12 *Hen. Stat. at Lar.* 157; 1 *Rev. Code of* 1819, *p.* 369 § 27.]

[21]

CHAP. IV.

FEE-TAIL.

Fee-tail is of whose body he shall come who shall inherit *(a)*.

Tenant in tail is said to be in two manners: tenant in tail general, and tenant in tail special. *Litt. s.* 13.

General tail is, where lands or tenements are given to a man and the heirs of his body. *Litt. s.* 14. 15.

Special tail is, where lands or tenements are given to a man and his wife, and to the heirs of their two bodies (*Litt. s.* 16) or to their heirs males, or to their heirs females *(b)*.

(a) [Estates in fee-tail were converted into fee-simple, in Virgina, by act of October 1776, and the creation of such estates in future prevented, by declaring that every limitation of an estate, which, as the law formerly stood, would have been a fee-tail, shall be deemed a fee-simple. *See* 9 *Hen. Stat. at Lar.* 226; 12 *Ibid.* 156; 1 Rev. Code of 1819, p. 368. § 22. In some of the states in the union, however, the statute *de donis*, under which *estates tail* originated, still operates; and even in those states, where *they* are converted into fee-simple, it may be sometimes necessary to know what limitation of an estate, would constitute a fee-tail, in order that it may be ascertained whether it be converted into a fee-simple, or not. For the learning on this subject, see *Hargrave's Co. Litt.*]

[Where *personal* estate is *limited* either by deed or will to one in tail, it is an absolute and complete disposition of the whole to him, his executors, or administrators; he may dispose of it as he pleases; if he do not dispose of it, it goes to his executors or administrators, and not to his issue; and it does not go to the remainder-men, or revert to the donor for default of issue. *Fearne Ex. Dev. Butl. edit.* 461, 463. 2 *Roper on Legacies* 393, 2 *edit;* 8 *Rep.* 95; *Co. Litt.* 186. *Harg. note* (7).]

(*b*) If lands be given to a man and to the heirs males or females of his body, he has an estate in general tail in him. Co. Litt. 25 b. So that it seems in such a case the proper expression would be tenant in

Tenant in tail is not punishable for waste.

Tenant in tail cannot devise his lands, nor bargain, sell, or grant, but for term of his life, without a fine or recovery.

If a man will purchase lands in fee, it behoves him to have these words, "and his heirs" in his purchase.

If a man would grant lands in tail, it behoves him to appoint what body they shall come of *(c)*.

Yet a *devise* of lands to a man and his heirs males is a good intail *(d)* and of lands to a man for ever, a good fee-simple *(e)*.

Haw lands shall descend (a). [22]

Inheritance is an estate which descends: It cannot lineally ascend from the son who purchases in fee and dies,

general tail male, or female; and where it is limited to the heirs male or female of a particular man by a particular woman, or of a man and woman, tenant in *special tail male*, or female, Com. Dig. (B 4) pl. 3. B 5 pl, 4, 5, are contradictory. Litt. s. 21. cited, does not support. Comyn. 1 Cru. Dig. 85 does not notice this distinction. *Vide* 2 Bac. Abr. 547. *Estate in Tail* (C), which is a good collection on this subject.

(c) For if lands be granted to a man and his heirs male, this is a fee-simple. *Co. Litt.* 13 *a.* So if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female, *Litt. s.* 31. but in a will those words will create an estate-tail. *Baker* v. *Wall*, 1 Ld. Raym. 185. *Co. Litt.* 27 b. Though it would be an estate-tail in the case of a grant, if the words "of his body" had been added, *Co. Litt.* 25 b. *Litt s.* 26 *Idle* v. *Coke*, 2 Salk. 621. pl 3. without the word *begotten*. 10 *Vin. Abr.* 257. 2 *Bac. Abr.* 544. 547.

(d) *Co. Litt.* 9 *b.* 27 *a.* *Cowp.* 833. 9 *East.* 382. 7 *Taunt.* 85, 3 *Bac. Abr.* 256. 6 *Cru. Dig.* 288.

(e) *Co. Litt.* 9 *b.* 1 *Co.* 85 *b.* 1 *P. Wms.* 77. *Cowp.* 352. 3 *Burr.* 1895. 11 *East* 518 4 *Bac. Abr.* 250. 6 *Cru. Dig.* 260.

[*(a)* The law of descents was altered in Virginia, by the act of 1785, which took effect the first day of January 1787. By this law very important innovations were made on the common law rule. Estates of inheritance descend in parcenary, to male and female; they may *ascend* to the father; and those of the *half-blood* may inherit in a certain proportion. See 12. *Hen. Stat. at Lar.* 138; 1 *Rev. Code of* 1819. *ch.* 96. *pa.* 355.]

to his father; but descends to the brother or uncle of the son or of his heirs, being the next of the whole blood; for the half blood shall not inherit, but the most worthy of blood; as of the blood of the father before the mother, of the elder brother before the other, if born within marriage.

A descent shall be intended to the heir of him who was last actually seised; that the sister of the whole blood, where the elder brother enters after the death of his father, and not his brother of the half blood, nor any other collateral cousin shall inherit; yet notwithstanding such a one is heir to a common ancestor: In which rule every word is to be observed, and so in every maxim, if the land, rent, advowson, or such like, descends to the elder son, and he die before any entry or receipt of the rent, or presentment to the church, the younger son shall have and inherit: And the reason is, because that in all inheritances in possession, he who claims title thereunto as heir ought to make himself heir to him who was last actually seised.

[23] Here the possession of the lessee for years or of the guardian, shall invest the actual possession and inheritance in the elder brother.

But he dying seised of a reversion, or a remainder, or an estate for life or in tail, there he who claims the reversion or remainder as heir, ought to make himself heir to him who had the gift, or made the purchase.

Feodo excludes an estate-tail, in which the second son shall inherit before the daughter (*b*).

And if the lands be once settled in the blood of the father, the heir of the mother shall never have them; because they are not of the blood of him who was last seised (*c*). [*But see note* (*a*) *ante*]

And lands shall descent to the heir of the blood of the first purchaser:

As if the father purchase land, and it descend to the son, who enters and dies without heirs of the father's part, then

(*b*) Plowd. 59. Co. Litt. 15 b. Watk. Des. 86.
(*c*) See Watk. Des. 149. 173.

the land shall descend to the heirs of the mother, or father of the father, and not to the heirs of the mother of the son, although they are more near of blood to him who was last seised, yet they are not of the blood of the first purchaser.

If the heirs be females in equal distance, as daughters, sisters, aunts, &c., *(d)* they shall inherit together, and are but one heir, and are called parceners. [*See notes to next chapter.*]

[For the principal rules of descent, at common law, with the feudal reasons on which they are founded, *see* 1 *Bl. Com.* 193; 2 *Bl. Com.* 208; *Co. Litt.* 237 *a.* ☞ *But see* 1 *Rev. Code of* 1819 *of Virginia, ch.* 96, *by which it will appear that the law of descents has been materially altered.*]

GAVELKIND

Descends to all the sons, and if no sons, to all the daughters *(a)*, and may be given by will by the custom.

(d) Or their heirs *per stirpes jure representationis. Vide* Watk. Des. 89. 150, n. Rob. Gavelk 91.

(a) 2 Bac. Abr. 300. *Descent* D. *Rob. Gavelk.* 90.

CHAP. V.

PARCENERS.

Parceners are of two sorts: Women and their heirs *(a)* by the common law, men by the custom *(b)*.

They may have a writ of partition *(c)*, and the sheriff may go to the lands, and by the oaths of twelve men make partition between them, and the eldest shall have the capital messuage by the common law, and the youngest by the custom *(d)*. Where the parties will not shew to the jury the certainty, there they shall be discharged in conscience, if they make partition of so much as is presumed and known by the presumptions and likelihoods.

[25] Parceners may by agreement make partition by deed or by word, and the eldest first choose, unless their agreement be to the contrary.

(a) The lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. 2 *Bl. Com.* 217.

(b) Of gravelkind, &c.—[And now by the laws of Virginia, lands descend to males and females, in parcenery. *See* 12 *Hen. Stat. at Lar.* 138; 1 *Rev. Code of* 1819, *ch.* 96 § 1.]

(c) And so may heirs in gavelkind at the common law. *Bract.* 71 *b*. Joint-tenants and tenants in common in fee by the 31 H. 8. c. 1; joint-tenants and tenants in common for life, or years, by the 32 H. 8. c. 32. *Litt.* s. 247. 265. *F. N. B.* 62. *Rob. Gavelk.* 105. *Co. Litt.* 167. *Booth, Real Actions*, 244. 1 *Bac. Abr.* 699. 3 *Bac. Abr.* 699. 2 *Cru. Dig.* 508, 2*d edit.* [And so may joint-tenants and tenants in common be compelled to make partition, by the laws of Virginia. *See* 12 *Hen. Stat. at Lar.* 349. 1 *Rev. Code of* 1819, ch. 98.]

[*(d)* But, in Virginia, no parcener shall have any privilege over another in divisions, &c. See 13 *Hen. Stat. at Lar.* 123, 1 *Rev. Code of* 1819, pa. 358 § 21.]

Every part at the time of partition must be of an even yearly value, without incumbrance.

Rent may be reserved for equality of partition (and may be distrained for) without a deed *(e)*.

(e) At the common law, estates of freehold, either corporeal or incorporeal, could not be voluntarily partitioned by *joint-tenants* without a deed. *Litt. s.* 290. *Co. Litt.* 169 *a.* 187 *a.* *Tenants in common*, however, might have made a partition by parol without deed, if as to corporeal estates they afterwards perfected the partition in severalty by livery of seisin, *Co. Litt.* 169 *a.;* and *coparceners*, whether of lands lying in livery or in grant, and although of lands situate in different counties, might have made a partition by parol without deed, *Litt. s.* 250. *Co. Litt.* 169 *a.;* and so joint-tenants for years might have made partition by parol without a deed. *Dyer*, 350 *b. pl.* 20. *Co. Litt.* 187 *a.* *Roberts on Frauds*, 283.

Since the statute of Frauds and Perjuries a *writing* is necessary to perfect a partition by agreement among tenants in common or corparceners, or joint-tenants for years, though as to joint-tenants in fee a *deed* is necessary now, because it was so at common law. 4 *Cru. Dig.* 96. s. 16, 2d *edit.* 2 *Bl. Com.* 324, and see *Johnson* v. *Wilson*, Willes, 248.

The modern method of effecting a partition in fee by agreement, is by lease and release to uses, or by the declaration of the uses of a fine or recovery.

The courts of common law are now rarely resorted to for obtaining a partition of estates, because they have a difficulty of proceeding to the full extent of justice, and if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in those courts, or if any of the tenants in possession are seised of particular estates only, the persons entitled in remainder cannot be bound by the judgment in a writ of partition. *Milford's* (now Lord Redesdale) *Pleadings*, 110, 2d *edit.* *Hargr.* n. *Co. Litt.* 169 *a.* (2). 1 *Fonbl. Eq.* 21. Partitions in courts of equity are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to certain persons to make the partition required, who proceed to divide the estate without a jury, and upon the return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties. But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day to shew cause against the decree after attaining twenty-one. *Tuckfield* v. *Buller*, Amb. 198. 1 *Dick.* 240. *S. C.* 2 *Cru. Dig.* 541, 2d *edit.* 2

[25] Parceners by divers descents, before partition being disseised, shall have one assise.

A parcener before partition may charge or demise her part.

The entry or act of one coparcener or joint-tenant shall be the act of both, when it is for their good.

If a parcener after partition be entered *(f)*, she may en-

Madd. Ch. 460, 2*d edit.*, although the infant, whether plaintiff or defendant, be only *cestui que trust*, and the legal estate capable of being conveyed by the trustees, *Lord Brook* v. *Lord and Lady Hertford*, 2 P. Wms. 519. *Attorney-General* v. *Hamilton*, 1 Madd. Rep. 214; but if no cause should be shewn, or cause shewn should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder not capable of being barred or destroyed should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill would be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment. *Mitf. Plead.* 97, 3*d edit.* 2 *Cru. Dig.* 512, 2*d. edit.*

A partition at *law* is perfected by the delivery of possession, in pursuance of the judgment of the court of law, which concludes all the parties to it without any conveyance whatever being made by them. But partition in *equity* proceeds upon CONVEYANCES to be executed by the parties, 1 *Madd. Chan.* 245, 2*d edit.*; in which case the same conveyances are necessary to confer a legal title, as if the parties had agreed to a private partition: and if the parties be not competent to execute the conveyances, the partition cannot be perfected. *Whalley* v. *Dawson*, 2 Sch. & Lef. 372. And where any of the parties are femes covert or tenants in tail, a fine or recovery will be *equally* necessary. But see as to the power of *parceners* tenants in tail, *Co. Litt.* 173 b. Husbands of parceners in fee, *Co. Litt.* 169, b. 170 b. 171 a. Infants parceners, *Co. Litt.* 171 a. *Litt.* s 258. However, in all cases where the lands are entailed, or the parties are married women, it is advisable to have a fine or recovery, and in case of infancy to delay a partition by *agreement* until majority, or proceed in some other mode to effectuate it.

[Cases may however occur, in which the difficulties of obtaining the legal estate, even by bill in equity, are so great, as to make it necessary to apply for legislative aid; as where there are infants, lunatics, &c. interested.]

(f) That is evicted by entry without action from the part allotted to her, by a person claiming under a superior title.

ter upon her sister's part, and hold it with her in parcenary, and have a new partition, if she sold none of her part before she was ousted *(g)*.

CHAP. VI.

JOINT-TENANTS.

JOINT-TENANTS are such as have joint estates in goods or lands, where he who survives shall have all without incumbrance, if the tenements abide in the same plight as they were granted *(a)*. [26]

(g) Litt. s. 262. 1 *Bac. Abr.* 703.

(a) Co. Litt. 180. *Litt.* s. 277. 3 *Bac. Abr.* 691. Com. Dig. *Estate* (K 1.) 2 *Bl. Com.* 179. Each of them may sever the joint-tenancy at his pleasure, by a gift or conveyance to a stranger to take effect in his life time, or by a release to his companion, *Co. Litt.* 186 *a. Perk.* s. 193, 197. 2 *Saund* 96. 3 *Bac. Abr.* 693–4, or by an alteration of the seisin, as by a conveyance to the use of, or in trust for himself.

An *exception* is to be made of *joint-merchants;* for the wares, merchandises, debts, or duties, they have as joint-merchants or partners, do not survive, but go to the executors of him who dies; and this is *per legem mercatoriam*, which is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico;* for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habit. Co. Litt.* 182 *a.* 2 *Beawes*, 99. *Noy*, 55. *Com. Dig. Merchant* (D). 3 *Bac. Abr.* 675. *Joint-tenants*, &c. (C). In pleading, when the estate of partners in the partnership property is to be mentioned, it is usually described a tenancy in common. *Watson on Partnership*, 65, *2d edit.*

Where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance

[The right of survivorship was abolished in Virginia, by an act of 1786, *see* 12 *Hen. Stat. at Lar.* 350: 1 *Rev. Code of* 1819, pa. 359 § 2.]

of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal, and this appears in the deed itself, it makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered in equity but as a trustee for the others, in proportion to the sum advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they are to be considered as tenants in common, or the survivors as trustees for those who are dead. Per Master of the Rolls. *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 291 pl. 3. *Jefferies* v. *Small*, 1 Vern. 217. *Lake* v. *Craddock*, 3 P. Wms. 158. See further, Watson on Partnership, 73, 2d edit. 2 Madd. Ch. 115, 2d edit. 2 Fonbl. Treat. Eq. 103, 5th edit. Sug. Vend. 522, 5th edit. So a lease renewed by one partner in his own name clandestinely is a trust for the partnership, and to be accounted for as partnership property. *Burroughs* v. *Elton*, 11 Ves. 29. *Featherstonhaugh* v. *Fenwick*, 17 *Ves.* 298.

It was formerly held, that lands purchased for the purpose of a partnership concern were, in all respects, a portion of the partnership fund, and were therefore distributable as personal property. Watson on Partnership, 81, 2d edit. However, in *Thornton* v. *Dixon*, 3 Bro. C. C. 199, Lord Thurlow determined, that though a copartnership agreement may alter the nature of real property, it must be express so to do; and that upon the death of partners, the houses and lands they held and used in the trade, would descend according to the rules of the common law. See also *Bell* v. *Phyn*, 7 Ves. 453. *Balmain* v. *Shore*. 9 Ves. 500. The doctrine upon this subject has been altered by a very recent decision in the case of *Townsend and others*, executors of *W. Mackintosh* v. *Devaynes and J. Mackintosh* reported Appendix, 1 Montagu on Partnership, 97. There is also a *dictum* of Lord Eldon, in *Selkrig* v. *Davies*, 2 Dow. P. C. 242, in which his Lordship is represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. The question will probably soon be brought forward again to receive a more solemn adjudication; in the mean time it is well understood to be the opinion of many gentlemen of the first professional eminence, that where real estate has been purchased with partnership property for the use of the partnership, it becomes personal property, not only

Joint-tenants may have several estates (*b*).

A joint tenant cannot grant a rent-charge but for term of his own life.

A joint-tenant may make a lease for life or for years of his part, or release, and the lessee for years may enter, although the lessor die before the lease begin, and his heir shall have the rent, but the survivor the reversion.

A joint-tenant may have a writ of partitition by the statute of 31 *H.* 8. c. 32 (*c*). A partition made by joint-tenants, of estates of inheritance, must be by deed, by word 'tis void.

[*See further on the subject of joint-tenants*, 2 Bl. Com. 180; Co. Litt. 180 b. 188 a.]

as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner. Eden's note, 3 Bro. C. C. 200.

So if two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies, when the principal or interest is paid, the survivor shall not have the whole, but the representative of him who is dead shall have his proportion. *Petty* v. *Styward*, 1 Ch. Rep. 58. 3 Atk. 734. 5 Bac. Abr. 39. 46. 20 Vin. Abr. 147. 2 Pow. Mortg. 699, 4th edit.

So if two take a lease jointly of a farm, the lease shall survive, but the stock on the farm though occupied jointly, shall not survive, *Jefferies* v. *Small*, 1 Vern. 217. 1 Eq. Ca. Abr. 290.

So part owners of a ship are tenants in common. *Ex parte Young*, 2 Ves. & B. 242. Vide *Curtis* v. *Perry*, 6 Ves. 739. *Ex parte Yallop*, 15 Ves. 60.

(*b*) *i e.* Two may have joint estates for their lives, and several inheritances, or the inheritance to one of them, *Co Litt.* 182 *a. b.* 183 *a.* 184 *a.* 189 *b.*; but an estate of freehold cannot stand in jointure with a term for years; nor a reversion upon a freehold, with a freehold and inheritance in possession, *Litt. s.* 302; nor a seisin in the right of a political capacity, with a seisin in a natural capacity. *Litt.* 297. *Co Litt.* 188 *a.* 4 *Bac. Abr.* 677.

[(*c*) So, by laws of Virginia, 1786, 12 *Hen. Stat. at Lar.* 349; 1 *Rev. Code of* 1819, *p.* 359.]

CHAP. VII.

TENANTS IN COMMON.

TENANTS in common are those who hold lands and tenements by several titles (*a*).

(*a*) The usual method of creating a tenancy in common, is to limit the estate to two or more persons, as tenants in common, and not as joint-tenants: or if it be intended to bar dower, as to one moiety, &c, to uses to bar dower in the usual way; and as to the other moiety, &c. to uses in fee, or to other uses to bar dower.

The words "equally to be divided" create a tenancy in common in a will, *Ratcliff's* case, 3 Co. 39 b. *King* v. *Rumbal*, Cro. Jac. 448. *Blissit* v. *Cranwell*, Salk. 226. *Prince* v. *Heylin*, 1 Atk. 493. or "equally to them," *Denn* v. *Gaskin*, Cowp. 657, or "equally and their heirs," *Lewen* v. *Cox*, Cro. Eliz 695. 1 Vern.32. or "and their heirs respectively," *Forcet* v. *Frampton*, Sty. 434. or any other words indicating an intention that the devisees, shall take several and distinct shares, more especially where it is not an immediade devise, but an executory trust. *Baker* v. *Gilles*, 2 P. Wms. 280. 9 Mod. 157. 2 Eq. Ca. Abr. 536. 3 Bro. Parl. Ca. 104. *Ettricke* v. *Ettricke*, Amb. 656. *Prince* v. *Heylin*, 1 Atk. 493. *Sheppard* v *Gibbons*, 2 Atk. 441. *Maryat* v. *Townley*, 1 Ves. 102. *Stones* v. *Heurtly*, 1 Ves. 165. *Rose* v. *Hill*, 3 Burr. 1881. *Garland* v. *Thomas*, 1 Bos. & Paul. New Rep. 82. 6 Cru. Dig. 426. 3. Bac. Abr. 679.

In conveyances deriving their effect from the principles of the common law, the words "equally to be divided" will not create a tenancy in common. *Furze* v. *Weeks*, 2 Roll. Abr. 90, pl. 5. 14 Vin. Abr. 482. *Stringer* v. *Phillips*, 3. Bac. Abr. 679. Limitations in a conveyance to uses receive the same construction as if contained in a deed at common law. Co. Litt. 42 a. (10). *Abraham* v. *Twigg*, Cro. Eliz. 478. *Atwaters* v. *Birt*, Cro. Eliz. 856. *Nevell* v *Nevell*, 1 Roll. Abr. 837. R. pl. 1. 10 Vin. Abr. 245. *Makepiece* v. *Fletcher*, Com. 457. *Tapner* v. *Merlott*, Willes, 177. *Stratten* v. *Best*, 2 Bro. C. C. 233. *Doe* v. *Morgan*, 3 T. R. 763. *Alpass* v. *Watkins*, 8 T. R. 516. The cases upon this subject are stated and commented on in a superior manner by Sir John Leach, in his able reply. *Cholmondeley* v. *Clinton*, 2 Meriv. [314]. See also Sug. Gilb. Uses, 143. 3 Bac. Abr. Gwill. Edit. 679. 680.

They may join in action personal, but they must have several actions real.

It was formerly held, that words *regulating* or *modifying* an estate created by a deed, operating by way of use, should be construed in a different manner than when applied to a common law conveyance. Thus Lord Hardwicke, in a case where the question was, whether the words *equally to be divided* would create a tenancy in common in a deed operating by way of use, observed, 2 Ves. 257. "It is objected that there is no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance at common law, and if construed in a different manner would cause great confusion; which I hold to be true in general: for the statute joining the estate and the use together, it becomes one entire conveyance by force of the statute; and the words are to be construed the same way; but this is to be taken with some restriction. As to the words of limitation in a deed, they are, to be sure, to be construed in that manner, viz. in the same sense; but where they are words of regulation or modification of the estate, as the words *equally to be divided* are, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the statute of Uses, which are trusts at common law, than in feoffments, which are strict conveyances at common law." *Rigden* v. *Vallier*, 2 Ves. 257. 3 Atk. 734.

So where *J. C.* by lease and release conveyed the lands in question to trustees, to the use of himself and his wife, for their lives, remainder to the use of all and every the children of *J. C.* and their heirs equally to be divided amongst them, the question being whether they took as joint-tenants or tenants in common. Lord Chief Justice Lee delivered the unanimous opinion of the whole court, that this being a deed of uses must be construed according to the intent of the parties, which most plainly was, that the children should take in common. *Goodtitle* v. *Stokes*, 1 Wils. 341, and see *Denn* v. *Gaskin*, Cowp. 660.

If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation, or modification of the estate; such a doctrine would, in some degree, tend to introduce all that latitude and uncertainty which now prevails in the construction of testamentary dispositions. Of this opinion was the late Mr. Booth, the author of the Treatise on Real Actions, and the most able conveyancer of the last century; who, in one of his opinions, says, "If deeds of uses must be governed by the same rules as prevails with respect to walls, then a limitation to a man's male descendants, or male children, may create an estate in tail; and an absolute inheritance may pass by a limitation to the use of the grantee for ever, which will produce infinite confusion." 2 Cas. &

They may have a writ of partition by the statute of *H.* 8. c. 32. [So, by laws of Virginia, 1786, 12 *Hen. Stat. at Lar.* 349; 1 *Rev. Code of* 1819, *pa.* 359.]

Opin. 279. Mr. Booth's opinion is confirmed by Lord Chief Justice Willes and his brethren, in the case of *Tapner* v. *Marlott*, Willes, 180, where he says, "As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion; for, since the statute of uses, an use is turned into a legal estate, to all intents and purposes, it must be conveyed exactly in the same manner, and by the same words; and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue."

Lord Thurlow, *Stratton* v. *Best*, 2 Bro. C. C. 240; and Lord Kenyon, *Doe*, dem. *Mussell* v. *Morgan* 3 T. R. 765; *Alpass* v. *Watkins*, 8 T. R. 519, have fully assented to this doctrine. Therefore the better opinion seems now to be, that conveyances to uses are to be construed in the same manner as deeds deriving their effect from the common law. 4 Cru. Dig. 309. Vide Sug. Pow. 463, 2d edit. Sug. note, Gilb. Uses, 144. 1 Sand. Uses, 118, 3 edit.

The same construction is put upon a trust *executed* as upon legal estates. *Wright* v. *Pearson*, Amb. 358. 1 Eden, 119. 1 Fonbl. Eq. 406, 5th edit. b. 1. ch. 6, s. 8; 1 Madd. Ch. 452, 552, 2d edit; 4 Cru. Dig. 310, 4th edit. Trusts executed are those where the trusts are directly and wholly declared by the deed or will to attach on the lands immediately. Trusts *executory*, are those which are only directory, or prescribe the intended limitations of some future conveyance or settlement, directed by the articles or will to be made for effectuating them. In decreeing the execution of marriage articles, and in the construction of executory trust estates, the Court of Chancery regards the end and consideration of the settlement, and the intent of the trusts, beyond the legal operation of the words in which the articles or the trusts are expressed. Fearne's Rem. 90 Butler's. edit. 3d edit. 62; 1 Madd. Ch. 552.

The analogy between the construction of legal estates and trusts executed, has been frequently affirmed: and Lord Talbot, speaking of *Bale* v. *Coleman*, 2 Vern. 670. 1 P. Wms. 142. 8 Vin. Abr. 265, pl. 7. says, "The execution was to be of the same estate as he had in the trust." An observation which seems equally applicable to all cases of trusts executed; that is, where the estates are finally limited by the deed or will itself, without any kind of reference to any further execution of them by a conveyance directed by that deed or will; for, in such cases, any occasional conveyance that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite, than for the mere purpose of investing the subsisting trusts, whatever they may be,

If one parcener, joint-tenant, or tenant in common take all, the others have no remedy but by *ejectione firmæ*, or such like, or waste *(b)*. [27]

GAVELKIND LANDS.

Tenant by the curtesy of Kent, whether he have issue or no, until he marry, or so forth; but he may not commit waste.

with their cognate and commensurate *legal* clothings; whilst limitations, whose effect is referred by the deed or will itself, to a conveyance directed to be made for their establishment, may reasonably be considered as left to some degree of modification by that supplemental part of the deed or will *viz.* the conveyance to which their completion is referred. In the one case, the limitations may be deemed to receive their intended shape from the words of the deed or will itself; when, in the other case, they are in a state of embryo, till delivered by the directed conveyance, which is intended to model and give them their ultimate form. Fearne's Rem. 143. Butler's edit. 93, 3d edit. The limitations of trust estates, of whatever description, cannot be carried to a greater length, or go further towards a perpetuity than the limitations of legal estates; but limitations of trust estates are expounded more freely, with more regard to the evident intent, and with less adherence to the legal import of technical expressions than limitations of legal estate. Fearne's Rem. Butler's edit. 145. 3d edit. 94.

(b) This was at common law; but by stat. *West.* 2, c. 22; and 4 *Anne* c. 16, actions of account are reciprocally given.—[So, by laws of Virginia, one joint-tenant or tenant in common, may maintain an action of account against the other, for receiving more than his just share or proportion. *See* 1 *Rev. Code of* 1819, *pa.* 509, § 81.]

CHAP. VIII.

TENANT IN DOWER.

A WOMAN shall be endowed of all sorts of inheritance of her husband, where the issue that she may have by him may inherit as heir to his father *(a)*, by metes and bounds of a third part.

[Trust estates, and an equity of redemption are excepted, in England; but *trusts* are subject to dower and curtesy in Virginia. *See act of* 1785, 12 *Hen. Stat. at Lar.* 157, 158; 1 *Rev. Code of* 1819, *p.* 370, § 30.]

She shall have house-room, and meat and drink, in common for forty days *(b)*. But she may not kill a bullock *(c)*

(a) If tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife has no estate in the tenements, and the husband has an estate only as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife die, in the life of the husband, and he afterwards take another wife and die, his second wife shall not be endowed in this case, because her issue could not by possibility inherit. *Litt. s.* 53. Although the wife be an hundred years old, or the husband at his death was but four or seven years old, yet the wife will be entitled to dower; because it is by nature possible that the wife may have issue; and though the husband be of such tender years, he has *habilum*, though he has not *potentiam* at the time. *Co. Litt.* 33 *a.* 40 *b.* *Co. Litt.* 31 *b.* *Perk. s.* 301, 302.

(b) By *Magna Charta*, cap. 7. 2. *Inst.* 16, one of the reasons for the widow continuing forty days within the capital messuage, was the apprehension of a suppositious child, which deceit was not uncommonly practised in these times, as may be inferred from the old writ *De ventre inspiciendo*. Barrington on Ancient Statutes, 10, 5th edit.

(c) Nota by *Newton*. The woman shall not have meat and drink; for the statute does not extend to it. But Fitzherbert, in abridging the case, queries if she may not kill any things for her provision, if there be not any provision in the house. F. N. B. 162 A. n. on the writ *De quarentina habenda.*

with those forty days after the death of her husband, in which time her dower ought to be assigned her.

[By the laws of *Virginia*, "The dead victuals and liquors which, at the death of the testator or intestate, shall have been laid in for consumption of his family, shall not be sold by the executor or administrator, but shall remain for the use of such family, without account thereof being made. If, however, before its final consumption, any child shall leave the family, such child shall have a right to carry with him or her an equal share of what shall then be on hand. Any live stock, which may be necessary for the food of the family, may be also killed for that use, at any time before the sale, division, or distribution of the estate." *Act of* 1785, 12 *Hen. Stat. at Lar.* 150; 1 *Rev. Code of* 1819, *pa.* 387, § 51—And the widow may remain in the mansion house, *until* dower be assigned, rent free, *Act of* 1785, 12 *Hen. Stat. at Lar.* 162; 1 *Rev. Code of* 1819, *pa.* 403, § 2.]

The assignment by him who had the freehold is good but by him who is guardian in socage, or tenant by *elegit*, or statute, or lessee for years, is not. *Perk. s.* 404; *Co. Litt.* 35 *a.*

She is to demand her dower on the land. She shall recover damages when her husband dies seised, from [28] the death of her husband, if the heir be not ready at the first day to assign her dower *(d)*.

She shall have all her chattels real again, except her husband sell them (*e*). He cannot charge them or give them by his will. And likewise her bonds, though the money were due in the life of her husband (*f*); and all

(*d*) Statute of Merton, 20 *Hen.* 3. c. 1. 2 Inst. 79. Co. Litt. 32 b. Muchall's Doctor and Student, 140, 18th edit. and by the statute of Gloucester, she is entitled to costs as well as damages. 6 *Ed.* 1 c. 1. 2 Inst. 283.

(*e*) 1 Bac. Abr. 476. *Baron and Feme* (C). 2.

(*f*) *Choses in action*, are debts owing, arrears of rent, legacies, residuary personal estate, money in the funds, upon morgage, &c. 1 *Bac. Abr.* 480. Marriage is only a qualified gift to the husband of his wife's

convenient apparel, but if she have more than is fit for her degree, it will be assets.

choses in action, *viz.* upon condition, that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. *Butler's n. Co. Litt.* 351 *a.* (1) II. *Scawen* v. *Blunt*, 7 Ves. 294. A mere intention to reduce the wife's *choses in action* into possession, will be insufficient. The acts to effect that purpose must be such as to change the property in them, in other words, must be something to devest the wife's right, and to make that of the husband absolute; such as judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied for his use. Prec. Chan. 412. 418. *Blount* v. *Bestland*, 5 Ves. 515. The transfer of stock into the wife's name, to which she became entitled during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship. *Wildman* v. *Wildman*, 9 Ves. 174. Where the father of *A.* a married woman, drew a check on his bankers in her favour for £10,000. On the same day she presented it, and instead of money she took from them a *promissory note*, payable on demand, which she delivered to *B.* her husband. During *B's* life all the money secured by the note remained with the bankers, except £1,000, which were received by *B.* and for which he gave his receipt, and he received the interest on the remaining sum of £9,000 up to his death. *A.* having survived her husband, claimed that sum as not having been received by him during his life. And it was determined in her favour by Sir *Thomas Plumer*, V. C. because the note was a *chose in action* of the wife, which, upon her husband's death, survived to her; and he observed, that if immediately after the check had been given, the husband had died, since it gave no legal right to sue the bankers if they had refused payment, the father alone could have recovered against them; that the note given to the wife in lieu of the check, gave a right to recover the sum, but that it was merely *in action*, and not like money or a chattel; and that the receipt by the husband of the £1,000, and of interest upon the remainder, was not a reduction into possession of such remainder, as such receipt did not alter the nature of the note, it still continuing a *chose in action*, a security for the remaining sum of £9,000. *Nash* v. *Nash*, 2 Madd. R. 133.

So also where money was left in the hands of trustees for the benefit of the wife, and her husband died, she was declared to be entitled to it by survivorship, her husband having made no disposition of it during his life. *Twisden* v. *Wise*, 1 Vern. 161. 1 *Rop. Husb. and Wife* 209.

A woman shall be barred of her dower (*g*) so long as she detains the body of the heir being in ward, or the writings of the son's land.

Where the wife has any right or duty, which by possibility may happen to accrue during the coverture, the husband may by release discharge it; but where the wife has a right or duty, which by no possibility can accrue to her during the coverture, the husband cannot release it. *Gage* v. *Acton*, 1 Salk. 326-7; Com. Rep. 67; 1 Lord Raymond, 515.

As if a lease be made to a husband and wife for the term of twenty-one years, the remainder to the survivor of them for twenty-one years, and the husband grants away this term and dies, this shall not bar the wife, because she had only a possibility, and no interest. *Lampet's* case 10 Co. 51 a. This point is not perhaps correctly stated. Co. Litt. 46, *b*. However it is followed. 1 Roll. Abr. 344, *pl.* 5; 2 Roll. Abr. 48. pl. 3; 4 Vin. Abr. 43, pl. 11; 14 Vin. Abr. 72, M, pl. 3; Roper's Tracts, 79 Roper Husband and Wife, 238; Butl. *n*. Co. Litt. 351, *a*. (1) II.

[(*g*) She shall also lose her dower, if she elope from her husband and live with an adulterer, *Stat. West* 2, 13 ed. 1. c. 34; Same law in Virginia; *see* 1 *Rev. Code of* 1819, p. 404 §10.]

[But the most usual way in which a widow is barred of dower, in England, is by the creation of *trust* estates which though liable to curtesy, "have not yet been subjected to dower, more from a cautious adherence to some hasty precedents, than from any well settled principle." 2 *Bl Com.* 337. And from analogy to trusts it has been determined that the wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband before the marriage. 2 *Bl. Com.* 132, *Christian's note* 11. The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of an use at common law. *Ibid.* Before the statute of uses there was neither dower nor tenancy by the curtesy of an use. It is therefore an unaccountable inconsistency, that since the statute, the husband should have curtesy of a trust estate, and that the wife should, out of a similar estate, be deprived of dower. Christian's note, 13, to 2 Bl. Com. 337. See *Colt* v. *Colt*, 1 Ch. Rep. 134, 254; 2 P. Wms. 640; 3 P. Wms. 229; 1 Bro. 326.]

[On the proper mode of conveying estates to USES TO BAR DOWER, much learning is displayed in the books while the most eminent lawyers, in England, regret the necessity of resorting to that subterfuge. But, in Virginia, this is obviated by legislative provision, which subjects trust estates, to both curtesy and dower. *See act of* 1785, 12 *Hen. Stat. at Lar.* 157, 158; 1 *Rev. Code of* 1819, p. 370, §30.]

A woman shall not be endowed of any lands which her husband jointly held with another at the time of his death *(h)*. [But by the laws of Virginia, estates held in joint-tenancy are subject to curtesy and dower. *See act of* 1786, 12 *Hen. Stat. at Lar.* 350; 1 *Rev. Code of* 1819, *ch.* 98, *p.* 359 §2.]

DOWER OF GAVELKIND LANDS.

The woman shall be endowed of one half so long as she is unmarried and chaste, and it may be held with the heir in common. *Co. Litt.* 33 *b*, 111, *a.*

It is of lands and tenements, and not of a fair or such like. Where the heir loses not his inheritance, there she loses not her dower. *Robin. Gavel.* 169.

[29]

JOINTURE.

If a woman have a jointure before marriage, she may claim no dower. 27 *H.* 8. c. 10 *(a)*.

If it be made during marriage, she may enter into her jointure presently *(b)*.

If she enter or accept of it she shall not be endowed *(c)*.

(h) Litt. s. 45. 1 Roll. Abr. 676, G, pl. 4. F. N. B. 147, E.

See further on the subject of dower, *Co. Litt.* 31 *a. and Hargr. notes;* 1 *Roper on Husband and Wife*, 332, &c.; and *Vin.* and *Bac. Abr; Com.* and *Cru. Dig.;* and a few observations at the end of the old editions of *Gilbert on uses.*

(a) [Same law in Virginia; *See act of* 1785, 12 *Hen. Stat. at Lar.* 164; 1 *Rev. Code of* 1819, p. 404, §11. At common law, a jointure would bar dower, even though the wife were a minor at the time she agreed to it, *Drury* v. *Drury*, 5 Br. Par. Ca. 570. But in Virginia, if the conveyance were before marriage and during the infancy of the feme, or if it were after marriage, in either case the widow may at her election waive such jointure, and demand her dower. Act of 1785, 12 *Hen. Stat. at Lar.* 164; 1 *Rev. Code of* 1819. p. 404, §11.]

(b) That is, without any assignment by the heir. And if it were made during coverture, she might, at common law, waive it on her husband's death, and demand her dower, Co. Litt. 36 b, as she may now do by the laws of Virginia above cited.

(c) Co. Litt. 36, b. 3 Co. 26 a. 4 Co. 3 a. Plowd. Com. 396 a. 1 Eden, 138. 3 Bac. Abr. 718.

If she should be expulsed of any part of her jointure, she shall be endowed of the residue of her husband's lands (*d*).

CHAP. IX.

TENANT FOR TERM OF LIFE.

Tenant for term of life, is he who has lands or tenements for term of his life, or another man's life, and no one of lesser estate can have a freehold.

If a tenant for life sow the lands, and die before the corn be reaped, his executor shall have it, but not the grass or other fruit.

If a tenant for life be impanelled upon an inquest, and forfeit issues and die, they shall be levied upon him in the reversion, and so likewise if the husband, on the lands of the wife.

[Few subjects in the law have produced such a diversity of opinion, as the properties of an estate *pur auter vie (for the life of another,)* and the doctrine of *special occupancy.* The cases, in the English books, are numerous and contradictory. To reconcile them has ever proved a vain attempt. *See in* 7 *Ves.* 445, *the doubts expressed by lord Eldon.* See further 2 *Bl. Com.* 120; *Ibid.* 260; *Co. Litt.* 41. *b*; 2 *Bac. Abr.* 558, 561, 564; Cru. Dig. *Estate for life.*]

(*d*) So, in Virginia, *Act of* 1785, 12 *Hen. Stat. at Lar.* 165; 1 *Rev. Code of* 1819, *p.* 405, § 13.

[See further on the subject of jointures, 2 *Bl. Com.* 137. *Co. Litt.* 36, b. *Wood Inst.* 23.]

[The law of Virginia taken from st. 29 *Car.* 2, c. 3. § 12, & 14, *Geo.* 2. c. 20, § 3, makes an estate for the life of another divisible, and if necessary to be *assets* in the hands of the devisee; if not devised, to be assets in the hands of the heir, as special occupant, or of executors or administrators, if no special occupant, and subject to debts, legacies, and distribution. *Act of* 1785, 12 *Hen. Stat. at Lar.* 152; 1 *Rev. Code of* 1819, *p.* 389, § 61.]

CHAP. X.

TENANT FOR TERM OF YEARS *(a)*.

Tenant for term of years is, where a man lets lands or tenements to another for certain years.

He may enter when he will, the death of the lessor is no let, and may grant away his term before it begin *(b)*: But before he enter he cannot surrender, nor have any action of trespass, nor take a release *(c)*.

He is bound to repair the tenements.

The lessor may enter to see what dilapidation or waste there is; and he may distrain for his rent, or have an action of debt.

(a) The doctrine of leases and terms for years is treated in a masterly manner in 4 *Bac. Abr.* 1; 7 *Idem*, 483; to which may be added *Wms n.* 2 *Saund.* 180; Com. Dig. *Estates* (G 1); 1 *Cru. Dig.* 256.

(b) Because it is an *interesse termini*, Co. Litt. 46 b. 338. 4 Bac. Abr. 195, *Gwil. edit.*

(c) But when an estate for years is created by bargain and sale under the statute of uses, the bargainee may take a release before entry.

If tenant for life or years grant a greater estate than he has himself he forfeits his term *(d)*.

[See further as to the law relating to tenant for years, 2 *Bl. Com.* 140; *Co. Litt.* 43 b.]

CHAP. XI.

TENANT AT WILL.

Tenant at will is he who holds lands or tenements at the will of another.

The lessor may reserve a yearly rent, and may distrain for it, or have an action of debt; the lessee is not bound to repair the tenements.

The will is determined by the death of the lessor *(a)* or of a woman lessee by her marriage; or when the lessee will take upon him to do that which none but the lessor may do lawfully, it determines the will and possession, and the lessor may have an action of trespass for it. [31]

(d) This depends on the species of conveyance by which it is granted; if it be by those which divest the remainder or reversion, as a feoffment, recovery or fine, it is a forfeiture; if by bargain and sale, or lease and release, it is not. 2 *Lev.* 60, 3 *Mod.* 151.

(a) *Sed quære de hoc.* The courts have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will; but have rather held them to be tenancies from year to year, as long as both parties please, especially where an annual rent is reserved. 1 *Cru. Dig.* 83. 2 *T. R.* 159. It has been settled, by several modern cases, that six months notice to quit must be given by a landlord to his tenant at will, or to his executors, before the end of which time an ejectment will not lie. *Christian's note*, 2 *Bl. Com.* 147 (3). *Butler's note*, *Co. Litt.* 270 b. (1). 4 *Gwill. Bac. Abr.* 180–1. 2 *Selw. N. P.* 688, 5th *edit.* 667, 4th *edit.* For where the duration of a lease is not prescribed by the terms of the contract, but is left subject to the will of the parties, the law, for the sake of con-

The lessee shall have reasonable time to take away his goods and his corn; but he shall lose his fallow and his dung carried forth.

venience, and that neither of the parties may be surprised or distressed by the caprice of the other, will not permit the tenancy to be determined without a regular notice. What shall be a regular notice must depend upon the nature of the letting: hence, if the letting be originally for a month or week, a month's or week's notice will be sufficient. 1 *T. R.* 102. *Espin Ni. Pr. Ca.* 94. 267. But where there is a clear tenancy from year to year, there must be half a year or 183 days notice, *(Bradley's Points MS.* 134) at the least, and determinable with the year. This notice being required for the sake of convenience, it must, consequently, extend to a tenancy in houses as well as in lands; it may be waived by the party giving it; or it may be wholly dispensed with by the consent of both parties. But no collateral considerations, such as a reservation of the rent quarterly shall be construed to be a dispensation with it. What shall be a waiver of a notice is a question of fact to be determined by the conduct of the party who has given it. Vide *Shirley* v. *Newman*, Espin. Ca. 266. *Oakapple* v. *Copons*, 4 T. R. 361. The receipt of rent accruing due after the expiration of the notice, *eo nomine* as rent, or the taking of a distress for such rent, have both been holden to be a waiver of it. *Goodright* v. *Cordwent*, 6 T. R. 219. *Zouch* v. *Willingale*, 1 H. Bl. 311.

The notice, except where the lessor means to proceed under the statute for double rent, need not be in writing; but, if it be in writing, a slight inaccuracy, where the intention of the party given is apparent upon the face of it, will not vitiate it. Therefore a notice delivered to a tenant at *Michaelmas* 1795, to quit at "Lady Day, which will be in the year 1795," was held to be good. *Doe* v. *Kightley*, 7 T. R. 63. 7 Bac. Abr. 487-8. Though by the stat. 29 *Car.* 2, cap. 3, *of Frauds and Perjuries*, no parol lease for above three years is to have any other effect than only as a lease at will; yet such a lease by the construction of the courts enures as a tenancy from year to year, and requires therefore a regular notice to determine the interest, as in other similar holdings. *Clayton* v. *Blakey*, 8 T. R. 3. But though the lease be void by the statute of Frauds, as to the *duration* of the term, in other respects the lease may be regarded as having an operation, at least, so far as its terms are applicable to a tenancy from year to year. So that if lands be let for seven years by parole, and the landlord agrees that the tenant shall enter at Lady Day, and quit at Candlemas, though such verbal lease is void by the statute of Frauds as to the *extent of interest* intended to be granted, yet the landlord can only put an end to the tenancy at Candlemas. *Doe* dem. *Rigge* v. *Bell*, 5 T. R. 471. Roberts on Frauds 245.

[See more concerning tenancy at will, 2 *Bl. Com.* 145, 147, *Christian's note* (3); *Co Litt.* 55 *a.*]

[A tenancy at *sufferance*, is where a man takes a lease for a term, and after the expiration of it, continues to hold possession of it, without any new lease from the owner of the estate. Or, if a man make a lease at will and die, the estate at will is thereby determined: but if the tenant continues possession, he is tenant at sufferance. 2 *Bl. Com.* 150. But a lease at will is now considered a lease from year to year, which cannot be vacated without half a year's notice to quit. 2 *T. R.* 159; 3 *Wils.* 25. Where a tenant has a lease for a term certain and holds over, after the expiration of it, it is not necessary for the landlord to give him notice to quit, in order to recover possession by ejectment. 1 T. R. 53, 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance, into a tenancy from year to year. *See* 2 *Bl. Com.* 151, *Christian's note* (5)].

CHAP. XII.

REMAINDER.

A REMAINDER is the residue of an estate at the same time appointed over, and must be grounded upon some particular estates given before, granted for years, or life, and so forth *(a)*.

(a) Vide 5 *Bac. Abr.* 715. *Gwil. edit.; Com. Dig. Estate* (B. 13). *Noy's Ten.* 72. 2 *Cru. Dig.* 262. *Fearne's Rem.* 11. *Butl. edit.;* 7, 3*d edit.*

And ought to begin in possession, when the particular estate ends: There should be no intermediate time between either, whether created by grant or will *(b)*.

No remainder can be of a chattel personal *(c)*: A remainder cannot depend on a matter *ex post facto*, as upon
[32] estate-tail, upon condition, that if the tenant in tail, sell, then the land to remain to another, is a void remainder.

CHAP. XIII.

REVERSION.

A REVERSION is the residue of an estate which is left, after some particular estate granted out, in the grantor: As if a man grant lands for life, without further granting, the reversion of the fee-simple is in the lessor.

[See further on the doctrine of reversions, 2 *Bl. Com.* 175; *Co Litt.* 22. b.]

[*(b)* By *will* a remainder in *effect and substance* may be created without a particular estate to support it; but in technical language it is called an *executory devise*. *See* 1 *Sid.* 153; *Fearne, Ex. Dev. passim.* See some important provisions, as to *remainders* and *contingent limitations*, introduced into the laws of Virginia, at the revisal of 1819, 1 *Rev. Code*, p. 368 § 20; p. 369 § 26.]

(c) Personal property cannot be rendered unalienable longer than for lives in being and 21 years after; it may, however, be limited in strict settlement for life, with remainder to sons and daughters in tail; but it will be the absolute property of the first tenant in tail *See* 3 *Co.* 95; *Co. Litt.* 18 *b*; *Harg. n.* (7).

CHAP. XIV.

WASTE.

Waste lies against a tenant by the curtesy, for life, for years, or in dower, and they shall lose the place wasted, and treble damages.

Waste lies not against a tenant by *elegit*, statute merchant or staple, but account after the debt or damage levied.

Waste or account will not lie against a tenant in mortgage, because he had fee conditional *(a)*.

Waste is not given to the heir for waste in the life of his father *(b)*. [28]

Waste is given against the assignee of the tenant for life, or of another's life, but not against the assignee of a tenant in dower, or of the curtesy, it is to be brought against themselves.

It is waste to pull up the forms, benches, doors, windows, walls, filberd-trees, or willows planted *(c)*.

(a) Though at law a mortgagee in fee may commit waste, yet he will be restrained in equity before foreclosure. *Hanson* v. *Derby*, 2 Vern. 392. 5 Bac. Abr. 15, 18. 7 Idem, 294. 1 Pow. Mortg. 348, 4th edit. If, however, the security be defective, the Court of Chancery will not restrain a mortgagee from his legal privileges. But the money arising from the sale of timber must be applied towards payment of the mortgage. *Withrington* v. *Banks*, Seld. Cas. ch. 31. 2 Cru. Dig. 116. Et vide *Hardy* v. *Reeves*, 4 Ves. 480.

(b) [So at common law, but remedied by statute, and an action of waste given to the heir. *See* 1 *Rev. Code of* 1819, *p.* 463 § 4.]

(c) See further, Com. Dig. *Waste.* 2 *Bl. Com.* 281; *Co. Litt.* 53; [Concerning the action of waste in Virginia, see 1 *Rev. Code of* 1819, *ch.* 117, *p.* 462]. It has been held that a tenant may, during the continuance of his estate, but not afterwards, remove chimney pieces or

CHAP. XV.

DISCONTINUANCE.

Discontinuance is where a man who has the present possession, by making a larger estate than he ought, divests the inheritance of the lands or tenements out of another, and dies, and the other has right to have them; but he cannot enter because of such alienation, but is put to his writ.

If a man seised in the right of his wife, or if a tenant in tail made a feoffment, and died, the wife could not enter, nor the issue in tail, nor he in reversion, but were put to their action.

[34] Now the wife may enter by the statute 32 *H.* 8. and a recovery suffered by the tenant by curtesy, or by the tenant after the possibility of issue extinct, or for term of life, is now made no discontinuance.

Such things as pass by way of a grant by deed without livery and seisin, cannot be discontinued as a reversion, or rent-charge, common, &c.

A release or confirmation without warranty makes no discontinuance *(a)*.

wainscot put up by himself. 1 *Atk.* 477. This action is now very seldom brought, and has given way to a much more expeditious and easy remedy by *an action on the case in the nature of waste.* As to the pleadings in the latter action, *see Wms. n.* 2 *Saund.* 252, *a. b.*

(a) See Co. Litt. 325 *a.* 333 *a. Butler's notes.*

CHAP. XVI.

DESCENTS.

Descents which takes away entries, are where a man disseises another and dies, and his heir enters, or makes a feoffment to another in fee or in tail, and he dies, and his heir enters, these descents put a man from his entry.

A descent during minority, marriage, *non sanæ mentis*, imprisonment, or being out of the realm, do not take away an entry.

Disseisin of rents in gross, the lord notwithstanding may distrain *(a)*.

A dying seised of a term for life, or of a remainder or reversion, does not take away an entry *(b)*. He must die seised of the freehold and inheritance. [35]

A disseisin cannot be to one joint tenant or parcener alone if it be not to the other.

If a condition be broken after a descent, the donor, feoffor, or his heirs may enter.

A wrongful disseisin is no descent, unless the disseisor have quiet possession five years without entry or claim. 32 *H.* 8.

(a) Vide Gilb. Rents, 106.

(b) Or put him who has right to his action. *Co. Litt.* 239 *b.* 243 *a. Finch's Law*, b. 2, ch. 3, 120, *Pickering's edit.* 1 *Co.* 134 *b.* 8 *Co.* 101 *b. Gilb. Ten.* 22. *Watk. Des.* 110.

CHAP. XVII.

CONTINUAL CLAIM.

Continual claim is a demand made by another of the property or possession of a thing which he has not in his possession, but is withholden from him wrongfully, and it defeats a descent happening within a year and a day after it is made, and now by the statute within five years.

[See *Gilb. Ten.* 39; *Co. Litt.* 250 *b.*]

CHAP. XVIII.

REMITTER.

[36] Remitter is when by a new title the freehold is cast upon a man, whose entry was taken away by a descent or discontinuance, he shall be in by the elder title: As if tenant in tail discontinue the estate-tail, and if he afterward disseise his discontinuee, and die thereof seised, and the land descend to his issue, in that case he is said to be in his remitter, viz. seised of his ancient estate-tail.

When the entry of a man is lawful, and he takes an estate to himself when he is of full age, if it be not by deed indented, or matter of record which shall estop him, it shall be to him a good remitter.

A remitter to the tenant shall be a remitter to him in the remainder and reversion *(a)*.

(a) Vide Butl. n. Co. Litt. 347 *b.* (1). *Ritso's Introduction*, 133. *Gilb. Ten.* 129.

CHAP. XIX.

TENURES.*

All lands are holden of the King immediately, or of some other person; and therefore when any person who has a fee dies without heir, the land shall escheat to the lord *(a)*.

And they are holden for the most part either by knight service or in socage *(b)*.

Knight service draws to it, ward, marriage and relief, viz.

OF WARD, MARRIAGE AND RELIEF (*b*). [37]

The heir male unmarried shall be in ward until twenty-one years of age.

If he be married in the life of his ancestors, yet the lord shall have the profit of the land till his full age.

None shall be in ward during the life of the father.

If the heir refuse a convenient marriage, he shall pay to the lord the value when he comes to full age.

If the ward marry against the will of the guardian, he shall pay him the double value of his marriage: But if the heir be of the full age aforesaid, he shall pay a relief.

A relief for a whole knight's fee is five pounds; for half a knight's fee fifty shillings; for a quarter, twenty-five shillings; for more, more; for less, less; accordingly.

A relief is no service, but is incident to a service, the guardian must not commit waste, *vide* Chattels Real.

[*(a)* By the constitution of Virginia, *article* 20, all escheats heretofore going to the king shall go to the commonwealth.]

(b) By the above statute 12 *Car.* 2. *c.* 24, Knight's service with its incidents of ward, marriage, and relief, were abolished, and every such tenure converted into *free* and *common socage.*

* Most of the ancient tenures were abolished in England, by statute 12 *Car.* 2. *c.* 24, and never prevailed in the United States. *See Co. Litt.* 85 *a. Hargr. n.* (1).

TENURE IN SOCAGE.

Tenure in socage is where the tenant holds of his lord by fealty, suit of court, and certain rent for all manner of service. Litt. § 117.

[38] The lord shall not have the wardship, but a relief presently after the death of his tenant.

A relief for socage land is a year's rent, and is to be paid presently upon a descent or purchase. As if the land were held by fealty, and ten shillings rent per annum, ten shillings shall be paid for relief.

The next of the kin to whom the inheritance cannot descend (*a*), shall have the wardship of the land and of the heir, until his age of fourteen years, to the use of the heir, at which age the heir may call him to account.

If the guardian die, the heir cannot have an action of account against the executor of the guardian. The executor of the guardian may not have the wardship, but some other of the next of kin. The husband cannot alien the interest of the wife in the guardianship, nor hold it; if she die it cannot be sold.

If another man occupy the lands of the heir as warden in socage, the heir may call him to account as guardian.

If the guardian hold the lands after the heir is fourteen, the heir shall call him to account as his bailiff (*b*).

[See further concerning socage tenure, *Co. Litt.* 85 *b*; 2 *Bl. Com.* 79; *Wright's Tenures* 142.]

(*a*) *Hargr. n. Co. Litt.* 88 *b.* (2).

(*b*) The authority of the guardian ceasing, by the common law, at so early an age as fourteen, was found to be productive of many inconveniences. This occasioned the *stat.* 12. *Car.* 2. *c.* 24, allowing parents to appoint guardians to their children until twenty-one. *See Co. Litt.* 93 *b. Hargr. n.* (3). The Court of Chancery, in England, being the supreme guardian, and having the superintendent jurisdiction of all infants, affords redress of all complaints relating to wards and guardians. 2 *Bl. Com.* 141.

GAVELKIND. [39]

The next of kin shall have the guardianship of the body and lands, until the heir be fifteen years of age.

CHAP. XX.

DIVERSITIES OF AGES.

A MAN has but two ages (*a*).

The full age of male and female is twenty-one.

A WOMAN HAS SIX AGES.

The lord her father may distrain for aid for her marriage when she is seven.

She is dowable at nine.

She is able to assent to matrimony at twelve.

She shall not be in ward if she be fourteen.

She shall go out of ward at sixteen.

She may sell or give her lands at twenty-one.

No man may be sworn in any jury before he be twenty-one; before which age, all gifts, grants or deeds, which do not take effect by delivery of his own hands, are void, and all others voidable, except for necessary meat, drink, and apparel, &c.

[(*a*) According to lord Coke, and the modern authorities, a man has four ages;—at 12 he may take the oath of allegiance; at 14 he is at years of discretion, and may chuse his guardian, make his will of personalty, &c. [but in Virginia, no person under 18 years of age can dispose of his chattels by will. 1 *Rev. Code of* 1819, *p.* 377 § 6.]; at 17 may be an executor; and at 21 is entirely at his own disposal. *Co. Litt.* 78 *b*; 2 *Bl. Com.* 463.

An infant may do any thing for his own advantage, as to be executor, or such like: An infant shall sue by his next friend, and answer by his guardian.

GAVELKIND.

The heir may give or sell at fifteen years of age.

1. The land must descend, not be given him by will.
2. He must have full recompense.
3. It must be by feoffment, and livery of seisin with his own hands, not by warrant of attorney, or any other conveyance.

By the civil law an infant may be an executor at seventeen years of age.

[40] An infant may make a will of his goods at fourteen years of age, and a maid at twelve (*a*).

CHAP. XXI.

RENTS.

There are three kinds of rents; rent-service, rent-charge, rent-seck (*aa*).

Rent-service is where a man holds his lands of his lord by a certain rent, &c.

Rent-charge is granted or reserved out of certain lands by deed with a clause of distress.

Rent-seck is a rent granted without a distress; or rent-service, severed from other service, becomes a rent-seck.

(*a*) *Godolphin's Orphan's Legacy*, 23. 7 *Bac. Abr.* 300 *Hargr. n. Co. Litt.* 89 *b.* (6).—[But by the laws of Virginia, no persons under the age of eighteen years, shall be capable of disposing of their chattels by will, 1 *Rev. Code of* 1819, *p.* 377 § 6].

(*aa*) Or, dry-rent. The difference between a rent charge and a rent-seck is, if there be a clause of distress, it is a rent-charge, if there be none, it is a rent-seck. *Co. Litt.* 143 *b.* *Gilb. Rents*, 38.

The reservation of a rent without a deed is void, if the reversion be not in the reservor. If a rent be granted from the reversion, it is a rent-seck. [41]

He who has no seisin of a rent-seck, is without remedy for the same.

The gift of a penny by the tenant in name of seisin of a rent-seck, is a good possession and seisin.

No rent can be reserved upon any feoffment, gift, or lease, but only to the donor and his heirs, not to any stranger. *Co. Litt.* 143 *b.*

A rent-charge is extinct by the grantee's purchase of parcel of the land, but by the purchase of any of his ancestors it shall not; it shall be apportioned like rent-service, according to the value of the land: but if the whole land descend of the same inheritance, the rent is extinguished.

By the grant of the reversion, the rents and services pass. If rent be granted to a man without saying more, he shall have it for term of his life. If the lord accept of rent or service of the feoffee, he excludes himself of the arrearages for the time of the feoffer.

For a rent-charge behind, one may have an action of annuity, or distrain.

CHAP. XXII.

DISTRESS.

For what, when, and where a man may distrain.

A Man may distrain for a rent-charge, rent-service, heriot-service, and all manner of service as homage, escuage, fealty, suit of court, and relief, &c. [42]

Heriot custom must be seised, and for amerciaments in

a leet, upon whose ground soever it be in the liberty. A man may not distrain for rent after the lease is ended, nor have debt upon a lease for life, before the estate of freehold be determined *(a)*.

A man cannot distrain in the night, except for damage-feasant.

A man cannot distrain the beasts of a stranger that come by escape, until they have been levant and couchant on the ground, but for damage-feasant.

A man cannot distrain the oxen of the plough, nor a millstone, nor such like, which is for the commonwealth, nor a cloak in a taylor's shop, nor victuals, nor corn in sheafs, but if it be in a cart, he may for damage-feasant *(b)*.

A distress must be always of such things as the sheriff may make a replevin.

A man may not sever horses joined together, or to a cart *(c)*.

[43] If a man put cattle into a pasture for a week, and after wards *J. N.* gives him notice that he will keep them no longer, and the owner will not fetch them away, *J. N.* may distrain them damage-feasant.

If a man take beasts damage-feasant, and driving them by the highway to the pound, the beasts enter into the house of the owner, and the taker prays the delivery of them, and the owner will not deliver them, a writ of rescous lies.

If a man distrain goods he may put them where he will; but if they perish, he shall answer for them.

If cattle, they ought to be put in a common pound, or else in an open place where the owner may lawfully come

(a) 1 *Roll. Abr.* 594 (G) *pl.* 1; 4 *Rep.* 49. But he may now by 8 *Ann. c.* 14. *s* 4. *Wms. n* 2 *Saund* 304 (8); [and the same provision in Virginia, *See* 1 *Rev. Code of* 1819, *p.* 451 § 20, 21.]

(b) This is to be understood of distress for rent only, and not of distress given in the nature of an execution, by any particular statute, as for poor rates, &c. 3 *Salk.* 136.

(c) This point seems not to be fully settled *See* 1 *Vent.* 36; *Raym.* 18; 1 *Sid.* 422; *Co. Litt.* 47 *a. Hargr. n.* (12).

and feed them, and notice given to him thereof, and then if they die, it is in default of the owner.

Cattle taken damage-feasant may be impounded in the same land; but goods or cattle taken for other things may not.

Sheep cannot be distrained, if there be sufficient distress besides.

No man shall drive a distress out of the county wherein it was taken.

No distress shall be driven forth of the hundred, but to a pound overt within three miles. [44]

A distress cannot be impounded in several places, upon pain of five pounds and treble damage.

The executor or administrator of him who had rent or fee farm in fee, in fee tail, or for life, may have debt against the tenant who should pay it, or distrain: and this is by the stat. 32 *H.* 8. *c.* 28.

So may the husband after the death of his wife, or his executor or administrator. So may he who has rent for another man's life, distrain for the arrearages after his death, or have an action of debt. 32 *H.* 8. *c.* 37.

But if the landlord will distrain the goods or cattle of his deceased tenant, and sell them, or work them, or convert them to his own use, he shall be executor of his own wrong (*d*).

(*d*) 2 *Bac. Abr.* 348; *Leon.* 220; *Owen* 124; 9 *Vin. Abr.* 160. *pl.* 8, *n*; *Gilb. Dist.* 71; 6 *Bac. Abr.* 34; *Co. Litt.* 47, *a*; 141, *a*; 2 *Bl. Com.* 41; 3 *Bac. Abr.* 20.—A distress, at the common law being considered only as a pledge to procure satisfaction, could not be sold; but this being found inconvenient when made for rent in arrear, was remedied by statute. *See* 2 *W. & M. c.* 5; 1 *Rev. Code of* 1819, *ch.* 113, *p.* 446; 3 *Bl. Com.* 13.

CHAP. XXIII.

DISSEISIN OF RENTS.

Three causes of disseisin of rent service, rescous, replevin, inclosure:

[45] Four of rent-charge, rescous, replevin, denial, and inclosure: Two of rent-seck, denial and inclosure. Forestalling is a disseisin of all.

Forestalling is when the tenant does with force and arms waylay or threaten in such manner, that the lord dares not distrain or demand the rent.

Denial is, if there be no distress on the land, or if there be no one ready to pay the rent, &c.

And of such disseisins a man may have an action of novel disseisin against the tenant, and recover his rent and arrearages, and his damage and costs; and if the rent be behind another time, he shall have a re-disseisin and recover double damage.

Rescous and pound breach, is if the lord distrain when there is no rent nor service behind, the tenant cannot rescue; otherwise if another distrain wrongfully; but no man can break the pound, although he rendered amends before the cattle were impounded.

If the lord come to distrain, and see the beasts, and the servant drive them out of his fee, the lord cannot have rescous, because he had not the possession, but he may follow them and distrain, but not for damage-feasant.

CHAP. XXIV.

COMMON. [46]

Common is the right which a man has to put his beasts to pasture, or to use and occupy the ground which is another man's.

THERE are divers commons, viz. common in gross, common appendant, common appurtenant, common because of neighbourhood. *See Terms of the Law.*

The lords of wastes, woods, and pastures, may approve against their tenants and neighbours with common appurtenant, leaving sufficient common and pasture to their tenants.

As if one tenant surcharge the common, the other tenants may have against him a writ *de admensuratione pasturæ*, but not against him who has common for beasts without number; neither may the lord inclose from such tenants, if he do, the tenant may bring an assise against him, and recover treble damage; but the lord may have a *quo jure*, and make the tenant shew by what title he claims.

See further, Co. Litt. 122. *a*; 2 *Bl. Com.* 32.

CHAP. XXV.

[47]

WAYS.

The king's highway is that which leads from village to village.

A COMMON highway is that which leads from a village into the fields.

A private way is that which leads from one certain place to another. 3 *Ed.* 3.

In the king's highway the king has only passage for himself and his people; and the freehold and all the profits are in the lord of the soil, as they are presented at the leet.

Of a common highway the freehold and the profits are to him who has the land next thereto adjoining; and if it be stopped, and I be damnified by it, I have no remedy but by presentment in the leet.

If a private way be straitened, or if a bridge there which another ought to repair, be decayed, an action on the case lies; but if the way be stopped, an assise of nuisance lies, and the lessee may have it after the lessor's years begin, or the lessee may have an action on the case. If the most part of a waterway be stopped, an assise will lie.

See further, Co. Litt. 56 *a; 2 Bl. Com.* 35; *2 Com. Dig.* 397.

CHAP. XXVI.

[48]

LIBERTIES.

A Liberty is a royal privilege in the hands of a subject.

All liberties are derived from the crown, and therefore are extinguished if they come to the crown again by escheat, forfeiture, or the like; for the greater drowns the lesser.

One may have a park, a leet, waif, stray, wreck of sea, and *tenura placitorum*, by prescription, and without allow-

ance in eyre; but not cognizance of plea; nor *catalla felonum, vel fugitivorum aut utlagatorum.*

A liberty may be forfeited by misusing it; as to keep a market otherwise than it is granted.

A liberty may be forfeited for not using it when it is for the good of the commonwealth; as not to exercise the office of the clerk of the market; but not to use a market, is no forfeiture.

Whatsoever is in the king by reason of his prerogative, cannot be granted or pardoned by general, but by special words.

CHAP. XXVII.

[49]

OF CHATTELS REAL.

Chattels real are guardianships, leases for years or at will, &c. (a).

Guardianship is the benefit of having the custody of the body or lands, or both, where the heir is within age; And the lord of whom the land is holden by knight service shall have the same to his own use; and as it is a chattel real, therefore his executor shall have it.

The guardian must not do waste, nor enfeoff, upon pain of losing the wardship: But he must maintain the building out of the issues of the lands, and so restore it to the heir.

If the committee of the king commit waste, &c. the wardship shall be committed to another; if the grantee, he shall lose the wardship.

(a) Chattels real are not called so, as being real estate, but because they are extractions out of the real. 3 *Atk.* 492. 4 *Bac. Abr.* 328. See further as to chattels real, 3 *Bac. Abr.* 60, *Gwill. edit.*

And one of the friends of the ward, being his next friend who will, may sue for him.

If a lease be made to a man and his heirs for twenty years, it is a chattel, and his executor shall have it: Otherwise if a man give by will a lease to a man and his heirs, here the word "heirs" are words of purchase, and the heirs shall have it *(b)*.

[50] If a man grant *proximam advocationem* to *J. S.* and his heirs, it is but a chattel, for it is but for *unica vice.*

Writings pawned for money lent, are chattels *(c)*.

If a woman have execution of lands by statute merchant and take a husband, he may grant it, for it is a chattel.

OF CHATTELS PERSONAL.

Chattels personal are gold, silver, plate, jewels, utensils, beasts, and other chattels and moveable goods whatsoever, obligations, and corn upon the ground.

All goods, as well moveable as unmoveable, corn upon the ground, obligations, right of actions, money out of bags, and corn out of sacks, *sunt catalla (d)*.

Money does not pass, by the grant of all his goods and chattels; nor hawks, nor hounds, nor other things *feræ naturæ (e)*, for the property is not in any person, not even after they are made tame, any longer than they are in his possession; as my hounds following me, or following my man; or my hawk, flying after a fowl, or my deer straying out of my park: But if they stray of their own accord, it is lawful for any man to take them; and the heir shall have them.

[51] All chattels shall go to the executors; as vats and furnaces fixed in a brew-house, or dye-honse, by the lessee;

(b) See on the distinction between *purchase and limitation. Fearne Conting. Rem.*

(c) 3 *Bac. Abr.* 65.

(d) Are chattels.

(e) Of a wild nature. *See Toller's Ex.* 147.

but if they be fixed by tenant in fee, the heir shall have them *(f)*.

Now something has been said concerning possessions : it follows that it be shewn, how they may be conveyed from one man to another.

CHAP. XXVIII.

OF CONVEYANCES.

In every conveyance there must be a grantor and a grantee, and something granted. *Perk.* §1. The conveyance of some persons is void, of other voidable. *Perk.* §2.

Conveyance of a woman covert is void, without the consent of her husband, and it ought to be made in her and his name, except it be done as executor to another. *Perk.* §6, 7.

The conveyance of an infant which does not take effect by the delivery of his own hands, is void ; and an action of trespass will lie against the grantee for taking the things given. *Perk.* §12, 13, 14.

Otherwise it is but voidable, except it be as executor, or for necessary meat and drink, &c. for his advantage. *Perk.* §14.

Voidable of *non sanæ memoriæ* or made by duress. *Perk.* §16, 17, 18. [52]

Voidable by the parties themselves and their heirs, and by those who shall have their estates, except *non sanæ* himself. *Perk.* §21.

Grants by fine are voidable by a writ of error, by an

(f) Vide 3 *Bac. Abr.* 60. *Com. Dig. Biens* (A. 1,) ; 2 *Bl. Com.* 120. 385 ; *Co. Litt.* 18 *b ;* 147 *b.* as to personal chattels.

infant during his non-age, and by the husband for a fine levied by his wife alone during their marriage. *Perk.* §19, 20.

The conveyance of some persons cannot be good for ever without the consent of others; as the dean without the chapter; the mayor without the commonalty; and of other bodies poilitic who have a common seal; or of a parson without the patron and ordinary. *Perk.* §31.

If there be be no addition in the conveyance it shall be intended the elder *(a)*.

A conveyance made to a woman covert shall be good and of effect, until her husband do disagree. *See Perk.* 154.

An infant may be grantee, so may a woman outlawed, a villain, a bastard, and a felon.

A bastard can have no heir but the issue of his body lawfully begotten.

[53] An infant at the age of discretion by his actual entry, and a woman against the will of her husband may be a disseisor or a trespasser.

In all conveyances there must be one named, who may take by force of the grant, at the beginning of the grant.

A grant made to the right heirs of one who is dead is good, or *custodibus Eccle.* is good for goods.

All chattels, real or personal, may be granted or given without a deed *(b)*.

Rent-service, rent-seck, rent-charge, common of pasture, or of turbary, reversion, remainder, advowson, or other things, which lie not in manual occupation, cannot be conveyed for years, for life, in tail, or in fee, without writing.

(*a*) If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition, yet the grant is good; for he cannot deny his own deed. *Perk.* s. 37. 3 *Bac. Abr.* 378. *Grants* (*C*).

(*b*) But since the statute of frauds, a writing is necessary as to chattels real. *Vide Roberts on Frauds*, 164.

The mayor or commonalty, or the like, cannot make a lease for years without a deed.

See further as to alienations 2 *Bl. Com.* 287.

CHAP. XXIX.

OF DEEDS.

Three things needful and pertaining to every deed are, writing, sealing, and delivering.

In the writing must be shewn the persons' names, their dwelling place, and degree, *(a)*. [54]

Things granted upon what consideration, the estate, whether absolute or conditional, with the other circumstances, and the time when it was done.

No grant can be made but to him who was party to the deed, except it be by way of remainder.

The words must be sufficient in law to bind the parties; as if a man grant *omnes terras certa sua (b)*, a lease for years passes not, but freehold only, at least *nec per omnia bona sua (c)*.

Exceptio semper ultimo ponenda est. (d).

The *habendum* must include the premises.

A condition cannot be reserved but by the grantor; and it is proper to follow the *habendum* presently.

The *habendum* or condition must not be repugnant to the premises, if it be, it is void, and the deed will take effect by the premises.

(*a*) See 2 Vin. Abr. 81. 88. Additions, C.
(*b*) All his certain lands.
(*c*) Not for all his goods. See Co. Litt. 118 b.
(*d*) The exception is always placed at the end.

A warranty is good although it extend not unto all the lands, nor to all the feoffees, or be made by one of the feoffors.

If a deed be erased or interlined in the date, or in any material place, it is very suspicious *(e)*.

See further concerning deeds, 2 Bl. Com. 298; Shep. Touchstone, ch. 5.

[55] OF SEALING. *(f)*

A writing cannot be said to be a deed if it be not sealed, although it be written and delivered, it is but an escrow.

And if it were sufficiently sealed, yet if the print of the seal be utterly defaced, the deed is insufficient, it is not my deed *(g)*.

It cannot be pleaded, but it may be given in evidence *(h)*.

OF DELIVERY.

A deed takes effect by the delivery, and if the first delivery take any effect, the second is void.

A jury shall be charged to inquire of the delivery, but not of the date; yet every deed shall be intended to be made when it bears date *(i)*.

(e) See Shep. Touch. 68, 69. Vin. *Faits*, T to Z. Com. Dig. *Faits* F. Hal. MSS. Co. Litt. 35 *b*. 7. Gilb. Evidence, 93, Sedg. edit. 105; 4th edit.

(f) Perk. s. 134. Com. Dig. *Fait* A 2. Shep. Touch. 55. Phillips on Evid. 505, 4th edit.

(g) Such defect arising from accident, would be supplied in equity. 2 Ch. Rep. 100; 2 Vern. 473

(h) See Perk. s. 135, &c. Gilb. Evid. 95, Sedgw. edit.; 107, 4th edit.

(i) Com. Dig. Evidence A 3. Hargr. n. Co. Litt. 36 a. 5 and 6; Phil. on Evid. 506, 585, 4th edit. As to the execution of deeds under powers, see Sug. Pow. 231, 2d edit. Phill. on Evid. 507.

Diversity in delivering of a Writing as a DEED OR ESCROW (*k*).

This delivery ought to be made by the party himself, or by his sufficient attorney, and so it shall bind him whosoever wrote or sealed the same.

If one be bound to make assurance, he need not deliver the deed unless there be one to read it to him before (*l*). [56]

And if any writing be read in any other form to a man unlearned (*m*), it shall not be his deed although he seal and deliver it (*n*).

THERE ARE TWO SORTS OF DEEDS.

A deed poll, which is the deed of the grantor; a deed indented, which is the mutual deed of either party. But in law, one is the deed of the grantor, and the other the counter part. And if any varience be in them, it shall be taken as it is in the deed of the grantor; and if the grantor seal only, it is good.

As to deeds in general, see 2 *Bl. Com.* 295, *Shep. T. c.* 4.

(*k*) A writing is delivered as an *escrow* when it is delivered not to the grantee himself, but to a third person, to hold till some condition on the part of the grantee be performed; till which it is no deed, and may be revoked on failure. *Co. Litt.* 36, *a.*

(*l*) *Thoroughgood's* case, 2 Co. 9 b.

(*m*) Or to a blind man, *Shulter's* case, 12 Co. 90. See also 4 Cru. Dig. 31. 2d edit.

(*n*) *Manser's* case, 2 Co. 3 a.

CHAP. XXX.

BARGAINS AND SALES.

No manors, lands tenements, or other hereditaments can pass, alter, or change from one man to another, whereby an estate of inheritance or freehold (*a*) is made, or takes effect in any person or persons, or any use thereof is made, by reason only of any bargain and sale thereof, except the [40] same be made by writing indented, sealed, and inrolled in one of the courts of record at Westminster, or within the same county or counties where the tenements so bargained do lie, before the *custos rotulorum* and two justices of the peace, and the clerk of the peace, or two of them, whereof the clerk of the peace to be one, and that within six (*b*) months after the date of such writing indented. 27 *H.* 8. *c.* 16. [*See Rev. Code of* 1819. *Index. tit.* "Conveyances;" "Deeds."]

The inrolment shall be intended the first day of the term, and shall have relation to the delivery of the deed against all strangers.

See further, as to Bargains and Sales. Shep. T. ch. 10.

(*a*) Bargains and sales for years are not restrained by this statute; and though they are not by deed indented nor inrolled, yet the statute of uses executes the possession to the use. 2 Inst 671. *Heyward's* case, 2 Co. 36. *Foxe's* case, 8 Co. 94. *Gilb. Uses*, 85 285. 2 Sand. *Uses*, 42, 3*d edit.* 4 *Cru. Dig.* 122, 2*d edit.* 1 *Bac. Abr.* 463.

(*b*) Lunar months. 2 *Inst.* 674; *Gilb. Uses*, 99. The time for inrolment is exclusive of the day of the date; and any instant of the last day of six lunar months shall be said to be, within the six months. *Thomas* v. *Popham*, Dyer, 218 b.

CHAP. XXXI.

FEOFFMENTS.

By a feoffment an estate is made, by the delivery of possession and seisin, by the party, or his sufficient attorney *(a)*.

A man cannot make livery of seisin before he has the possession.

A joint-tenant cannot enfeoff his companion *(b)*.

A coparcener may make a feoffment of his part, or release.

A man cannot enfeoff his wife.

A disseisor cannot enfeoff the disseisee; for his entry is lawful upon the disseisor. [58]

Such persons as have possession in lands for years or for life, &c. cannot take by livery and seisin of the same lands *(c)*.

If a feoffment be made, and the lessee for years give leave to the lessor to make livery and seisin of the premises, saving to himself his lease, &c. and he does, the term is not surrendered; for the lessee had an interest which could not be surrendered without his consent to surrender, and here his intent to surrender does not appear; where-

(a) Since the 29 *Car.* 2. *c.* 3, it must be put in writing, and signed by the parties making the same. *See further*, 3 *Bac.* Abr. 144. 2 *Sand.* Uses, 1. *Butl.* n. *Co. Litt.* 271, *b.* (1.) I.

(b) See the reason, 3 *Bac. Abr.* 694. [The statute of uses, 27 *Hen.* 8. *c.* 10, which by transferring the possession to the use, rendered livery of seisin unnecessary to pass the freehold, deeds of feoffment have been almost superseded by conveyances by lease and release.]

(c) Because having the possession already, they cannot have a further possession: the proper way of conveying a greater estate to them, is by release in enlargement; or to confirm their possession, a confirmation.

fore he may enter, and have his term, and the rent is renewed: but it is otherwise with a lessee for life, and the rent is extinct.

The lessor cannot make livery and seisin, against the will of the lessee being on the land; but he may grant the reversion, and if the lessee do attorn, the freehold will pass without livery of seisin.

See further as to a deed of feoffment, Shep. T. ch. 15; 2 *Bl. Com.* 310; *Co. Litt.* 271 *b, note* (1).

LIVERY OF SEISIN.

Livery of seisin is a ceremony used in conveyance of lands, that the common people might know the passing or alteration of the estate. It is requisite in all feoffments, [59] gifts in tail, and leases for life, made by deed or without deed.

No freehold will pass without livery of seisin, except by way of surrender, partition, or exchange, or by matter of record, or by testament.

Livery of seisin must be made in the life-time of him who made the estate.

Dona clandestina sunt semper suspiciosa (d).

By livery of seisin in one county, the lands in another county will not pass.

Livery within view is good, if the feoffee do enter in the life-time of the feoffor.

Livery cannot be made of an estate to be given *in futuro,* for no estate of freehold can be given *in futuro,* but shall take effect presently by livery and seisin.

OF USES (*e*).

The statute of 27 *H.* 8. *c.* 10. has advanced uses, and established a surety for him who has the use against the

(*d*) Clandestine gifts are always suspicious.

(*e*) See, on the Doctrine of Uses, *Cruise on Uses,* or 1 *Cru. Dig.* 387, 2*d edit*; *Butl. n. Co. Litt.* 271 *b.* (1,) II. *to the end.* On Trusts, 1

feoffees (*f*): For before the statute, the feoffees were owners of the land, but now that is destroyed, and the *cestui que use* (*g*) is the owner of the land: Before the statute the possession ruled the use, but since, the use governs the possession. Indentures subsequent are sufficient to direct the uses of a fine or recovery precedent, when no other certain and full declaration was made before (*h*). [60]

The intention of the statute of uses was to abolish conveyances to uses: but the strict construction put on it by the

Cru. Dig. 451, 2*d ed; Butl. n. Co. Litt.* 291 *b.* (1). On Uses and Trusts, *Sanders on Uses and Trusts; Sugd. edit. of Gilbert on Uses; Rowe's edit. of Bacon on Uses; the second book of Fonblanque's Treatise of Equity; Sugden on Powers.*

A devise may be made to uses under the statute of uses. Thus a devise to *A.* and his heirs, to the use of *B.* and his heirs, would give the legal fee to *B.* But if the testator's intention cannot take effect under the statute of uses, the law will leave its effect to the statute of wills. Thus if a devise be made to the use of a A. for life, with remainders over, if it were considered as a limitation under the statute of uses, it would be void for a want of a seisin to serve the uses, *Butln. n. Co. Litt.* 271 *b.* (1), III. 5. So if a devise be to *A.* and his heirs, to the use of *B.* and his heirs, and *A.* die in the testator's life time, perhaps the courts would, in favor of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to *B.* at once. But even admitting that the devise would be void at law, yet equity would compel the testator's heir to fulfil the intention, by conveying the estate to the same uses. Sug. Pow. 133, 2d edit. But whether a devise to uses operates solely by the statute of wills, 1 *Collectanea Juridica*, 427; or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of speculation than of use, 2 *Fonbl. Eq.* 24, 5*th Edit.* as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best, with the intention of the testator. *Butl. n. ubi supra.* See further, *Powell on Devises*, 272; 1 *Saund Uses*, 203, 3*d edit;* 195, 2*d edit;* *Gilb. Uses*, 162. 281. *Sugd. edit.* 356 486. 1 *Cru. Dig.* 436, 2*d. edit.* The subject is interesting and leads to important results.

(*f*) To uses.

(*g*) He who has the use.

(*h*) Gilb. Uses, 54 259.

courts, has restored the effect of them in the doctrine of *trusts*, which are now applied to the same purposes as uses were before the statute, *See* 1 *Atk.* 591.

ATTORNEY.

An attorney ought to do every thing in the name, and as the act of him who gave him the authority ; as leases in name of the lessor (*i*), but he must say, by virtue of his letter of attorney, I do deliver you possession and seisin of, &c. for &c.

An attorney must first take possession before he can make livery of seisin.

If an attorney do make livery of seisin otherwise than he has warrant, then it is a disseisin to the feoffer. *See Co. Litt.* 52. a, *note* (2).

An attorney must be made by writing sealed, and not by word (*k*).

(*i*) *Combes's* case, 9 Co. 76 b. But it is immaterial whether the attorney place his own name first or last. Therefore an execution thus "for *J. B.* (the principal), *M. W.* (the attorney,) *L. S.*" is valid. *Wilks* v. *Backs*, 2 East, 142. The proper way is "*J B.* by *M. W.*" 1 Wms. Conv. 175.

Where an attorney enters into an *agreement* on behalf of his principal, the agreement should be made and signed in the name of the principal by him as attorney ; for if an attorney covenant in his *own* name for *himself, his heirs, &c.* he will himself be personally bound, though he be described in the instrument as covenanting for, and on the part of his principal. *Appleton* v. *Binks*, 5 East, 148 ; *Kendray* v. *Hodgson*, 5 Esp. Ca. 228 ; See *Duke of Norfolk* v. *Worthy*, 1 Campb. N. P. 337. *Bowen* v. *Morris*, 2 Taunt. 375 ; *Sugd. Vend.* 42, 5*th edit.*

(*k*) Though the contract itself must, by the statute of frauds be in writing, *an authority* to buy or treat for lands as agent for another may be good, and effectual without any writing. *Waller* v. *Hendon and Cox.* 5 Vin. Abr. 524, pl. 45. *Wedderburne* v. *Carr*, cited 3 Wooddes. Lect, 427. *Coles* v. *Trecothick*, 9 Ves. 250. It is however in all cases highly desirable that the agent should have a written authority.

CHAP. XXXII.

EXCHANGE.

In an exchange both the estates must be equal (a).

There must be two grants, and in every grant mention must be made of this word "Exchange."

It may be done without livery of seisin, if it be in one shire, or else it must be done by indenture, and by this word "Exchange," or else nothing passes without livery. [61]

Exchange imports in the law a condition of re-entry, and a warranty, voucher, and recompense, of the other land which was given in exchange. *Bustard's case* 4 *Co.* 121. *a.*

An assignee cannot re-enter, nor vouch, but rebate *(b)*; an exchanger may re-enter upon an assignee *(c)*. And the same condition defeated in part, is defeated in the whole *(d)*. And the same law is in partition *(e)*.

(a) That is, equal in *interest*, as fee-simple for fee-simple, &c. but it is not necessary that they should be of equal *value*. *Litt.* § 64; 2 *Bl. Com.* 323.

(b) *Finch's Law*, 116. In case of eviction from the part received in exchange by a person claiming under a superior title. *Litt. s.* 262.

(c) Of the part given in exchange, in case of eviction from the part received in exchange, before alienation in fee of any part of the land received in exchange. *Litt. s.* 262.

(d) *Dumpor's* case, 4 Co. 120 a.

(e) *Co. Litt.* 173 *b.* 1 *Back. Abr.* 703. *Coparceners* (F).

CHAP. XXXIII.

GRANTS.

Grants must be certain. A grant to *J. S.* or *J. N.* is void for the uncertainty, although it be delivered to *J. S.*, for the delivery of the deed will not make a void grant good, or to take effect.

The lord cannot grant the wardship of his living tenant, because of the uncertainty who shall be his heir, unless he name some person.

[62] When any thing is granted which is not certain, as one of my horses, then the choice is in the grantee.

When several things are granted, then it is in the choice of him that is to do the first act.

A man cannot charge or grant that which he never had.

A man may charge a reversion.

A parson may grant his tithes, or the wool of his sheep, for years.

A thing in action, a cause of suit, right of entry, or a title for a condition broken, or such like, may not be given or granted to a stranger, but only to the tenant of the ground, or to him who has the reversion or remainder. *See* 10 *Co.* 48.

A thing which cannot begin without a deed cannot be granted without a deed; as a rent-charge, fair, &c. Every thing which is not given by delivery of hands, must be passed by deed. The right of a thing real or personal, cannot be given in, or released by word. A rent or condition, or a re-entry, cannot be reserved to one who is not party to the deed. *See ante Max.* 10.

All things which are incident to others, pass by the grant of those things which they are incident to. *See ante Max.* 13.

[63] A man by his grant cannot prejudice him who has an elder title.

If no estate be expressed in the grant, and livery and seisin be made, then the grantee has only an estate for life: But if there be such words in the grant, as will manifest the will of the grantor, so if his will be not against the law, the estate shall be taken according to his intent and will.

All grants shall have a reasonable construction and all grants are made to some purpose, and therefore reason would they should be construed to some purpose. *See ante Max.* 45.

A grant shall be taken most strongly against him who made it, and most beneficially for him to whom it is made.

To grants of reversion, or of rent, &c. there must be attornment, otherwise nothing passes, if it be not by matter of record.

See further on the subject of grants, *Co. Litt.* 9. a; *Shep. Touchs. ch.* 12; 2 *Bl. Com.* 317.

ATTORNMENT. (*a*)

Attornment is the agreement of the tenant to the grant by writing or by word; as if he say, I do agree to the grant made to you, or I am well contented with it, or I do attorn unto you, or I do become your tenant, or I do deliver unto the grantee a penny by way of seisin of a rent, or pay, or do but one service only in the name of the whole; it is good for all. [64]

(*a*) By stats. 4 *Anne*, *c.* 16. *s.* 9. and 11. *Geo.* 2. *c.* 19. *s*, 11. attornment is, in all cases, become unnecessary, though it is still operative; thus, if a termor attorn to the grant of a stranger, it would be a forfeiture. *Vide* further, *Gilb. Ten.* 81; *Wrights's Ten.* 171. *Wms. n.* 1 *Saund* 234. a. (4); *Sug. Gilb. Uses*, 198, (7,) 225; *Ritso*, 88; 1 *Pow. Mortg.* 227, *Butler's note*, *Co Litt.* 309 a 1; 3 *Bac. Abr.* 387, *Grants* G. [In Virginia, grants of rents, or reversions, or remainders are good without attornment; and any tenant who shall have paid his rent to the grantor, before notice of the grant, shall not suffer thereby. Attornments to strangers are void, unless by consent of the landlord or the judgment or decree of a court. *See* 12 *Hen Stat. at Lar.* 158; 1 *Rev. Code of* 1819, *p.* 370 § 32, 33.]

It must be done in the life-time of the grantor.

Without attornment a seignory, a rent-charge, a remainder, or a reversion, will not pass but by matter of record.

Without attornment services pass not by the sale of the manor, nor from the manor but by bargain and sale inrolled.

Attornment must be made by the tenant of the freehold, when a rent-charge is granted.

By the attornment of the termor to the grantee of a reversion, with livery, the reversion and the rent also pass, though no mention be made thereof. Before attornment a man cannot distrain, nor have any action of waste.

By fine the lord may have the wardship of the body and lands, before the attornment of his tenant.

The end of attornment is to perfect grants, and therefore cannot be made upon condition or for a time.

A tenant who is to perfect a grant by attornment, cannot consent for a time, nor upon a condition, nor for part of a thing granted; but it shall enure for the whole absolutely.

[65] If the tenant have not true notice of all the grant, then such attornment is void.

Attornment is unnecessary upon a devise *(b)*.

CHAP. XXXIV.

LEASES.

A Lease for years must be for time certain, and ought to express the term, and when it should begin, and when it should end, certainly; and therefore a lease for a year, and

[*b*] Of a rent-service or a rent charge, or of a reversion expectant on a lease for life or years, and the devisee might have distrained, or had a writ of waste, though the tenant never attorned. *Litt. s.* 585, 586.

so from year to year during the life of *J. S.* is but for two years, and it may be made by word or writing. If I lease to *J. N.* to hold until one hundred pounds be paid, and make no livery of seisin, he has an estate only at will. *See* 1 *Mod.* 180; 1 *Stra.* 655.

A lease from year to year, so long as both parties please, after the commencement of any year it is a lease for that year, &c. till warning be given to depart. 14 *H.* 8. 16. [Such a lease is good for two years certain, and afterwards an estate at will. *Bul.* N. P. 84; 1 *Wils.* 262.]

A lease beginning from henceforth shall be accounted from the day of the delivery; for the making shall be taken inclusive from the day of the making, or of the date exclusive (*a*).

If lands descend to the heir, before his entry, he may make a lease thereof.

A man lets a house *cum pertin' (b)*, no lands pass: But if a man let a house *cum omnibus terris eidem pertin' (c)* there the lands enjoyed therewith pass. [But it has been held that a close adjoining to the house, and also orchards, gardens, yards, and cartilages will pass by the word *appurtenances*. *See Plowd.* 170; *Cro. Jac.* 526.] [66]

If a man let lands wherein are coal-mines, quarries, and the like, if they have been used the tenant may use them, and if they be not open, if the tenant open them and employ them not on the land, it is waste: Likewise marl. The land is the place where the rent is to be paid and demanded, if no other place between the parties be limited.

Trespass is not given for not paying the rent to the lessor on the land although it be payable there.

And if a man let lands without impeachment of waste (*d*), and a stranger cut down the trees, and the lessee brings an action of trespass, he shall not recover for the value of the

(*a*) See *Pugh* v. *Duke of Leeds*, Cowp. 714. *Sug. Pow.* 587, 2*d edit*; *Powell on Powers*, 433, 540.

[*b*] *With the appurtenances.*

[*c*] *With all the lands belonging to the same.*

[*d*] Without any liability to punishment for committing waste.

trees, but for the crop, and breaking of his close; and the heir of the lessor shall have such trees, and not the executor of the lessee, unless they be cut by the lessee, and enjoyed by the grantee without waste.

Lessee for years or for life, tenant in dower or by the curtesy, or tenant in tail after possibility, &c. have only a special interest or property in the trees (*e*), being upon the
[67] ground, growing as a thing annexed unto the land, as they are annexed thereunto.

But if the lessee (*f*) or any other sever them from the land, the property and interest of the lessee in them is determined, and the lessor may take them as things which are parcel of his inheritance, the interest of the lessee being determined.

To accept the rent of a void lease will not make the lease good; but of a voidable lease it will (*g*).

If the husband and wife do purchase lands to them and the heirs of the husband, and he make a lease, and die, his wife may enter, and avoid the lease for her life; but if she die, leaving the husband, who afterwards dies before the term ends, the lease is good to the lessee against the heir.

Where it is covenanted and granted to *J. S.* that he shall have five acres of land in *D.* for years, this is a good lease, for *concessit* (*h*) is of such force as *dimisit* (*i*).

If a man make a lease for ten years, and afterwards makes another lease for twenty-one years, the latter shall be a good lease for eleven years, when the first is expired.

If the lessee at his own cost put glass into the window,
[68] he cannot take the same away again, but if he do he

[*e*] This special interest or property extends principally to housebote, ploughbote, and haybote, *viz.* necessary wood for fuel, implements of husbandry and repairs. *Co. Litt.* 41 *a.*

[*f*] See *Herlakenden's* case, 4 Co. 63 a.

[*g*] *Vide* Wms. n. 2 Saund. 180 c; 4 Bac. Abr. 13, 117, Leases C, and H.; 7 Bac. Abr. 64, *Void and Voidable;* 1 Rop. Husb. and wife, 90.

[*h*] Granted.

[*i*] Demised.

shall be punished for waste (*k*): And so of wainscot and beds fastened to the ceiling, if not fixed with screws.

Tenant in tail may make a lease for such lands or inheritance, as have been commonly letten to farm, if the old lease be expired, surrendered, or ended, within one year after the making of the new: but not without impeachment of waste, nor above twenty-one years, or three lives, from the day of the making, nor without reserving the old rent, or more, 32 *H.* 8. 28. Indenture of lease, by tenant in tail, for twenty-one years, made according to the form of the statute, rendering the ancient or more rent, if the tenant in tail die, it is a good lease against his issue; but if a tenant in tail die without issue, the donor may avoid this lease by entry (*l*). 32 *H.* 8. 28. And if he in the remainder do accept the rent, it shall not tie him, for as the tail is determined, the lease is determined and void. *Ed.* 6. 19.

The husband may make such a lease of his wife's lands by indenture, in the name of the husband and wife, but she must seal the lease, and the rent must be reserved to the husband and his wife, and to the heirs of the wife, according to her estate of inheritance. *See Co. Litt.* 45. *a.*

A lease made by the husband alone, of the lands of [69] his wife, is void after his death, but the lessee shall have his corn (*m*).

By the husband and wife voidable, if it be not made as aforesaid.

If a man let lands for years, or for life, reserving a rent, and enter into any part thereof, and take the profit thereof, the whole rent is extinguished, and shall be suspended during his holding thereof.

[*k*] *Co. Litt.* 53 *a*; 4 *Co.* 63 *b*; 1 *Atk.* 477; 3 *Bac. Abr.* 63. The doctrine of annexation has, on principles of public policy, been gradually relaxing. *Ambl.* 113; 2 *Str.* 1141; *Toll. Ex.* 198; *Off. Ex.* 62.

[*l*] *Pain's* case, 8 Co. 34 *a*.

[*m*] That is, which he has sown.—Such a lease seems not to be void absolutely, but only voidable, by the entry of the wife. *Hob.* 5; *Cro. Jac.* 332.

The acceptance of a re-demise to begin presently is a suspension of the rent before any entry: Otherwise of a re-demise to begin *in futuro (n)*.

RESERVATIONS AND EXCEPTIONS.

There are divers words by which a man may reserve a rent, and the like, which he had not before, or to keep that which he had, as *tenendum, reservendum, solvendum, faciendum* (*o*), it must be out of a messuage, and where a distress may be taken, and not out of a rent, and must be comprehended whithin the purport of the same word.

Exceptions of part ought always to be of such things as the grantor had in possession at the time of the grant.

[70] The heir shall not have that which is reserved, if it be not reserved to him by special words.

If a man make a feoffment of lands, and reserve any part of the profits thereof, as the grass or the wood, that reservation is void; because it is repugnant to the feoffment. *See Shep. Touchs.* 79.

A man by a feoffment, release, confirmation, or fine, may grant all his right in the land, saving unto him his rent-charge, &c. Things which are gained only by taking and using, as pasture for four bullocks, or two loads of wood, cannot be reserved but by way of indenture, and then they shall take effect by way of grant from the grantee to the grantor, during his life, and no longer, without special words.

Exceptions of things, as wood, mines, quarry, marl, or the like, if they be used it is implied by the law, that they shall be used; and the things without which they cannot be had, is implied to be excepted, although no, &c.

But otherwise, if they be not used, then the way and such like must be excepted.

An assignee may be made of lands given in fee, or for

[*n*] *in future.*

[*o*] *To hold, to reserve, to pay, to make.* See Co. Litt. 47 a.

life, or for years, or of a rent-charge, although no mention be made of "assigns" in the grant.

But otherwise it is of a promise, covenant, or grant or warranty. [71]

If a lessee assign over his term, the lessor *(p)* may charge the lessee or assignee *(q)* at his pleasure.

But if the lessor accept of the rent of the assignee, knowing of the assignment, he has determined his acceptance, and shall not have an action of debt against the lessee, for rent due after the assignment *(r)*.

If after the assignment of the lessee the lessor grant away his reversion, the grantee cannot have an action of debt against the lessee (*s*).

If a lessee assign over his interest and die, his executor shall not be charged for rent due after his death *(t)*.

(p) An assignee of a reversion may have an action of *debt* for rent against the *lessee*, and the action being founded, not upon any privity of *contract*, but upon privity of estate only, is local. *Wms. n.* 1 *Saund.* 241 *b.* 238 [1] 4. Com. Dig. *Action* [N. 4. 6.]

(q) The lessor may bring an action of *debt* against the *assignee*, upon the privity of estate there is between them by virtue of the assignment for the rent actually incurred during his enjoyment. 2 *Bac. Abr.* 73, *Covenant* [E] 4. 1 *Fonbl. Eq.* 359 [y].

(r) By reason of his own acceptance, which has extinguished the privity of contract. *Walker's* case, 3 Co. 24 a. b; Cro. Jac. 334. Nor can he distrain, though he may still have an action on the lessee's *covenant* for the payment of the rent. 1 *Roll. Abr.* 522 [N,] *pl.* 1; 6 *Vin. Abr.* 412; *Bull. N. P.* 159; 1 *Saund.* 240. But if the covenant be merely implied by law, as *yielding and paying*, it seems his acceptance of the assignee for his tenant leaves him without remedy against the lessee. 1 *Fonbl.* 362, 5*th ed. Wms. n.* 1 *Saund.* 241 *a.* And the assignee of the reversion may have an action of covenant by 32 *Hen. 8. c.* 34. *Brett* v. *Cumberland*, Cro. Jac. 521. 522. *Thursby* v. *Plant*, 1 Saund. 240. See further, *Butl. n. Co. Litt.* 269 *b.* [3]; *Gilb. Ten.* 67, 68; *Sug. Vend.* 31, 254, 5*th edit. Staines* v. *Morris*, 1 Ves. & Bea. 11; 2 *Bac. Abr.* 72, 73; 2 *Saund.* 302 *a.* [5].

(s) Because there was no privity of estate between them, as the lessee assigned his term before the grant of the reversion. 1 *Saund.* 241.

(t) Lord *Coke*, in *Walker's* case, 3 Rep. 24 a. says, it was *adjudged*, in *Overton* v. *Sydhall*, that if the *executor* of a lease for years assigns

If the executor of a lessee assign over his interest, an action of debt does not lie against him for rent due after the assignment. (*See last note*).

If the lessor enter for a condition broken, or the lessee surrender, or the term end, the lessor may have an action of debt for the arrearages. [*See* 8 *Anne* c. 14 §6; 1 Rev. Code of 1319, p. 451 §20, 21, by which the lessor may *distrain.*]

A lease for years rendering rent, with a condition, that if the lessee assign his term, the lessor may re-enter; the lessee assigns, the lessor receives the rent from the hands of

over his interest, an action of *debt* doth not lie against him for rent due, after the assignment, and that if the *lessee for years* assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined. In answer to which it may be observed. 1. That *Popham* the Chief Justice, in his report of the same case, (Poph. 120,) says, that he was of another opinion: and in Moor, 352, *Walker* v. *Harris;* Latch. 262, *Iremonger* v. *Newsam;* and in 1 Show. 341, *Pitcher* v. *Tovey*, it is said that no judgment was given. 2. The case may be admitted to be law, if the lessor, after the assignment, either by the lessee or the executor, *accepted of the assignee as his tenant:* for then the lessor cannot bring *debt* against the executor, because the privity of contract was determined by the assignment, and acceptance of the assignee. But, 3dly, if it were decided in that case, either that the assignment itself, without any acceptance of the assignee, destroyed the privity of contract; or that the death of the lessee for years, after an assignment of the term by him, without any acceptance of the assignee, determined the privity of contract; so that the lessor in either of these cases cannot maintain an action of *debt* after such assignment, such decision appears not to be well considered; and indeed the case of *Overton* and *Sydhall* has been frequently denied. 1 Sid. 266, *Heller* v. *Cusbard.* 1 Lev. 127, S. C. 3 Mod. 325, *Coghill* v. *Freelove.* 2 Vent. 209, S. C. 4 Mod. 76, *Pitcher* v. *Tovey.* For it is now settled by these cases, that the privity of contract of the testator is not determined by his death, but the executor shall be charged with all his contracts so long as he has assets; and therefore he shall not discharge himself by making an assignment without the consent of the lessor, but shall still be liable in an action of *debt*, as well as *covenant*, for the rent incurred afterwards; and so, where the testator himself has assigned the term in his life-time, his executor is chargeable in the same manner. 3 Mod. 326, *Wilkins* v. *Fry*; 1 Meriv. 265. Wm. n. 1 Saund. 241. [See 1 Rev. Code of 1819, p. 452, 453.]

the assignee, not knowing of the assignment, it shall not exclude the lessor of his entry. [72]

A thing in action may be assigned over for a good cause, as just debt: As where a man is indebted to me twenty pounds, and another owes him twenty pounds, he may assign over his obligation to me in satisfaction of my debt, and I may justify the suing for the same in the name of my debtor at my own proper costs and charges.

Also where one has brought an action of debt against *J. N.* who promises me, that if I will aid him against *J. N.* I shall be paid out of the sum in demand, I may aid him.

An assignee of lands, though he be not named in the condition, yet he may pay the money to save his land (*u*).

But he shall receive none, if he be not named: The tender shall be to the executor of the feoffees (*v*).

An assignee shall always be intended, to be him who has the whole estate of the assignor, which is assignable. A condition is not assignable (*w*); nor the office of an executor or administrator. The law will not allow an assignee in law, if there be an assignee in deed (*x*): So long as any part of the estate remained to the assignor, the tender ought to be made to him or his heirs, and it serves; yet a colourable payment to the heir shall not divest the estate out of the assignee, as a true payment will (*y*). *Vide* COVENANT. [73]

(*u*) Thus, a feoffee upon condition to pay a sum at *Michaelmas*, and in default of the feoffor to re-enter, the feoffee aliens before *Michaelmas*, the second feoffee may pay. *Litt. s.* 336, 5 *Co.* 96 *b.*

(*v*) *See Litt. s.* 337; *Co. Litt.* 210 *a.* The personal representatives are always entitled to money secured on mortgage. *See Butl. n. Co. Litt.* 208 *b.*

(*w*) *See Litt. s.* 347; *Fearne's Rem.* 192, 2*d ed.*; *Butler's ed.* 271; *Wms. n.* 1 *Saund.* 288; *Perk. s.* 831; *Co. Litt.* 215. *a.*

(*x*) Assignees are either in *fact*, sometimes called in *deed*, or in *law*. Com. Dig. *Assignment* (B); *Co. Litt.* 8 *b.* The law will never seek out an assignee in law, when there is an assignee in fact. 5 *Co.* 97 *a*; 3 *Buls.* 169; A devisee is an assignee in law. 2 *Show.* 59; 3 *Vin. Abr.* 156.

(*y*) *Vide Litt.* 336; *Co. Litt.* 209 *b*; *Goodall's* case; 5 *Co.* 96 *a*; *Shep. Touch.* 143; *Doug.* 187.

CHAP. XXXVI.

SURRENDERS.

A SURRENDER is an instrument testifying with apt words, that the particular tenant of lands or tenements, for life or years, does sufficiently consent, that he who has the next immediate remainder or reversion thereof, shall also have the particular estate of the same in possession, and that he yields or gives the same to him for ever. A surrender ought forthwith to give a present possession of the (*a*) thing surrendered unto him who has such an estate, wherein it may be drowned (*b*).

A joint-tenant cannot surrender to his companion.

An estate in things, though it cannot be granted without a deed, may be determined by the surrender of the deed to the tenant of the land (*c*).

Lessee for years cannot surrender before his term begins, he may grant, but he cannot surrender even a part of his lease (*d*).

[74] *Surrenders are made in two ways, in*

DEED, OR IN LAW.

A surrender in law is when the lessee for years takes a new lease for more years. [Though the new lease be for a

(*a*) Or *executed* interest in the thing surrendered, sometimes called a vested interest. *Watk. Des.* 42, 3*d ed*; *Fearne's Rem.* 1; *Sug. Gilb. Uses.* 231. As if tenant for life in remainder surrender to the remainder-man in fee, he cannot have a present possession, but only a present right to future enjoyment. Perk. s. 605. 616.

(*b*) *Com. Dig. Surrender* (I 1.), (L 2.); *Shep. Touchs.* 300; *Co. Litt.* 338 *a*; *Perk. s.* 584; 4 *Bac. Abr.* 209; *Wms. n.* 1 *Saund.* 235 *b.* (9).

(*c*) *Vide Co. Litt.* 338 *a*; *Perk.* s. 581. 585; *Roberts on Frauds.* 247.

(*d*) Because it is only a right to enter at a future time. Co. Litt. 338 *a*. But he may *release* to the lessor.

less number of years than the old one, it is equally a surrender in law. *Shep. Touchs.* 301.]

A surrender in deed must have sufficient words to prove the assent and will of the surrenderer to surrender, and that the other do also thereunto agree (*e*).

The husband may surrender his wife's dower for his life, and her lease forever.

By deed indented a man may surrender upon condition.

[*See further* 2 *Bl. Com.* 326; *Shep. Touch. c.* 17; *Co. Litt.* 337. *note* (1).

CHAP. XXXVII.

RELEASES.

A RELEASE is the giving or discharging of a right or action, which a man has or claims against another, or out of or in his lands.

(*e*) Where an estate is limited to *A.* for life, remainder to *B.* for life, remainder to *C.* the eldest son of *A.* in fee; and *A.* in the life-time of B. in consideration of an annuity of £14, to be paid by the said *C.* to him out of the premises, and for other considerations, did, by deed, give, grant, surrender, and confirm unto the said *C.* and his heirs, the said premises; it was held, that, though the deed could not operate as *a surrender*, according to the intent of the parties, upon account of *B's* intermediate estate for life, yet there being a consideration of blood between father and son, the conveyance should operate *as a covenant to stand seised.* *Per* Lord Kenyon, *Stafford* Summer Assizes, 1797, *Doe*, on demise of *Woolley* v. *Pickard;* and it must be *pleaded* as a covenant to stand seised, and not as a *surrender.* 4 Mod. 150, *Barker* v. *Lade.* Wms. n. 1 Saund. 236 c. A similar circumstance occasionally occurs in practice; and the validity of many titles depends on this construction. 2 *Saund. Uses*, 79, 3*d ed*; *Butler's n. Co. Litt.* 337 *b.* (2).

A release or confirmation made by him, who at the time of the making thereof had no right, is void, though a right come to him afterwards, unless it be with warranty, and then it shall bar him of all right which shall come to him after the warranty made.

[75] Release or confirmation made to him who at the time of the release or confirmation made, had nothing in the lands, is void, it behoves him to have a freehold or a possession and privity.

A release made to a lessee for years, before his entry, is void (*a*).

A man cannot release upon a condition, nor for a time, nor for part; but either the condition is void, and the time is void, and the release shall enure to the party to whom it is made for ever, for the whole, by way of extinguishment. But a man may deliver a release to another as an escrow, to deliver to *J. S.* as his act and deed, if *J. S.* do perform such a thing, or a release upon a condition by deed indented, may be good.

A joint-tenant of a rent-charge may release, yet all the rent is not extinct; or if he purchase the lands, his companion shall have the rent still.

If the grantee release parcel of a rent-charge to the grantor, yet all the rent is not extinct.

A release to enlarge an estate ought to have these words "and his heirs" or words to shew what estate he shall have.

[76] A release made to him who has a reversion or a remainder shall serve and help him who has the freehold: So shall a release made to a tenant for life, or a tenant in tail, enure to him in the reversion or remainder, if they plead it: and so to trespassers and feoffees, but not to disseisors. *Litt. s.* 522.

A release of all manner of actions does not take away an entry, nor prevent the taking of one's goods again, nor is it any plea against an executor.

(*a*) *i. e.* At common law; but after a bargain and sale for years, under the Statute of Uses, it is otherwise.

A release of all demands extinguishes all actions real and personal, appeals, executions, rent-charge, common of pasture, rent-service, and all right and seisure, and all right in lands and property in chattels; but not a possibility *(b)* or future duty*(c)*, as a rent payable after my death, and the like.

[*See on the doctrine of Releases. Co. Lit.* 264, *a*; *Shep. Touch, c.* 19; 2 *Bl. Com.* 324.

CHAP. XXXVIII.

CONFIRMATION.

Confirmation is when one ratifies the possession, as by deed, to make his possession perfect, or to discharge his estate, which may be defeated by another's entry.

As if a tenant for life will grant a rent-charge in fee, then he in the reversion may confirm the same grant. [77]

Where a man by his entry may defeat an estate, there by his deed of confirmation he may make the estate good.

A confirmation cannot enlarge an estate which is determined by express condition or limitation *(a)*. To confirm an estate for an hour, if it be to tenant for life, it is good

(b) But it might be released by proper words; for he who is to have an interest by any possibility, may release the same to the present possessor, as well as if he had a future right, because it is according to the policy of the law, for the quiet and peace of the possessors. *Lampet's* case, 10 Co. 48 a. b; *Gilb. Uses*, 143; *Ritso* 48. So possibilities of personal estates are devisable, as well as assignable, in equity. *Fearne's Rem.* 549. 560, *Butl. ed.* 439. 447, 3*d ed.*

(c) A release of all actions will discharge a bond debt payable at a *future* day, for it is *debitum in præsenti*, though *solvendum in futuro. Co. Litt.* 292 b.

(a) For though a confirmation may make a voidable or defeasable estate good, it cannot operate on an estate which is void in law. *Co. Litt.* 295 b. So a confirmation of a void lease does not make it good. *Dyer*, 239 *b*; *Com. Dig. Confirmation* (D. 1.)

for life; if to tenant in fee, for ever. *See Litt. s.* 519; *Co. Litt.* 297 *a.*

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land: But if a freehold be confirmed, it shall enure to the whole absolutely.

A confirmation to enlarge an estate, must have words to shew what estate he shall have.

The estate for tenant for life can only be confirmed to his heirs, by *habendum* the land to him and his heirs; and therefore it is good to have such *habendum* in all confirmations (*b*).

In a confirmation new service cannot be reserved, but an old service may be abridged (*c*).

A confirmation made to one disseisor, shall be voidable to the other; so shall not a release.

[*See as to confirmation Co. Litt.* 295 *b. n.* (1); 2 *Bl. Com.* 325.]

[*Of the conveyance. by Lease and Release, omitted by the author because its validity was doubted by him, but now very common, see* 2 *Bl. Com.* 339; 2 *Mod.* 249; *Raym.* 798; 3 *Burr.* 1794.]

CHAP. XXXIX.

[78] ## CONDITION.

There are two sorts of conditions, one expressed by words, another implied by the law; the one called a condition in deed, the other a condition in law.

If an estate be made, and the condition is against the law, the estate is good, and the condition is void.

(*b*) *Litt. s.* 523. 532, 533; *Co. Litt.* 299 *a;* Com. Dig. *Confirmation.* (B. 3.)

(*c*) As if the tenant held by fealty and 20*s* rent, the lord may confirm his estae, to hold only by 12*d.* rent. *Litt. s.* 538.

If the estate begin by the condition, then both are void.

Bonds with conditions, expressly against the law, are void *(a)*.

Conditions repugnant, the estate good, the conditions void.

(a) All the instances of conditions against law, in a proper sense, are reducible under one of these heads :—

1st. Either to do something which is *malum in se*, or *malum prohibitum*. Co. Litt. 206.

2ndly. To omit the doing of something which is a duty. Palm. 172. Hob. 12, *Norton* v. *Simms*.

3dly. To encourage such crimes and omissions. Fitzh tit. *Obligation*, 13. Bro. tit. *Obligation*, 34. Dyer, 118.

Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes ; and therefore, as in the text, and in Co. Litt. 206, a feoffment shall be absolute for an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good, Hob. 12; Cro. Car. 22; Perk. s. 228; *Mitchell* v. *Reynolds*, 1 P. Wms. 189; in which case the subject is treated in a masterly manner.

Where the condition of a bond is entire, and the whole be against law, it is void ; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. *Rex* v. *Yale*, 2 Brown. P. C. 381 ; 5 Vin. Abr. 99. pl. 9; *Chesman* v. *Nainby*, 2 Lord Raym. 1459; 2 Stra. 744, S. C. ; *Norton* v. *Simms*, Hob. 14 ; Mo. 856, 857; pl. 1175. *Twyne*'s case, 3 Co. 83 *a; Mosdel* v. *Middleton*, 1 Vent. 237; 1 Saund. 66 a. But if a sheriff take a bond for a point against 23 H. 6. concerning bail bonds, and also for a just debt, the whole bond is void; for the letter of the statute is so. *Norton* v. *Simms*, Hob. 14; 3 Viner's Abr. 551.

Those bonds which chiefly deserve consideration on the ground of unlawfulness, are such as relate to—

I. *Bonds restraining trade.*

Though a bond, covenant, or promise, even on good consideration, not to use a trade *any where in England*, is void, as being too general a restraint of trade; yet if such bond, covenant, or promise, be not to use a trade *at a particular place*, it is good. *Prugnell* v. *Gossee*, Allen, 67. For the same reason it seems, that a bond, covenant, or promise, not to use a trade with *particular customers* by name, if founded on a good consideration, is also valid. *Hunlock* v. *Blackstone*, 2 Saunder's

Conditions impossible, are void, the estate good: It shall not enlarge any estate.

156. All the cases on this subject, prior to *Mitchell* v. *Reynolds*, 1 P. Wms. 181. are noticed in that case. There, in debt on bond, the defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in *L.*, in the parish of St. A. for the term of five years, if the defendant should not exercise the trade of a baker *within that parish* during the said term; or in case he did, should, within three days after proof thereof made, pay to the plaintiff £50, *then* the obligation to be void: and pleaded that he was a baker by trade, had served an apprenticeship to it, by reason whereof the bond was void in law, wherefore he traded as he well might; and, on demurrer, the court was of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the bond was good; and that the true distinction was not between *promises* and *bonds*, but between contracts *with* and *without* consideration; and that wherever a sufficient consideration appeared to make it a proper and a useful contract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general, not to exercise a trade *throughout the kingdom*, and where it is limited to a *particular place*—that the former is void, being of no benefit to either party, and only oppressive; but the other is good. The principle of this case was afterwards recognized and adopted in *Chesman* v. *Nainby*, 2 Stra. 739; 2 Ld. Raym. 1456; 3 Bro. P. C. 349, S. C. So, where the condition of a bond was, that, in consideration A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A, B agreed not to practice on his own account for fourteen years within ten miles of the place where A lived, the bond was held good. *Davis* v. *Mason*, 5 T. R. 118; see *Sloman* v. *Walter*, 1 Bro. C. C. 418. And where by indenture between A and B and C, dissolving their partnership as rope-makers, A and B covenanted to allow C, during his life, two shillings on every hundred weight of cordage which they should make, on the recommendation of C, for any of his friends and connections, and whose debts should turn out to be good: and that A and B should stand the risk of such debts incurred; but should not be compelled to furnish goods to any of C's connections whom they should be disinclined to trust. And C covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted in his or their name, pursuant to the indenture should be the exclusive property of A and B; and that C should, during his life, exclusively employ A and B, and no other person, to make all the

By pleading, a man cannot defeat an estate of freehold, by force of a condition in deed, unless he shew the condi-

cordage ordered of him, by or for his friends and connections, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. It was holden, that the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, *A.* and *B.* not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and B. so much of *C's* private trade as they chose to give his friends credit for, so much only was covenanted to be transferred: and *C.* was still at liberty to work for any of his friends, who were refused to be trusted by *A.* and *B.;* by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.;* and therefore the restraint on *C.* could be no prejudice to public trade. *Gale* v. *Reed*, 8 East. 80; 2 Saund. 156 n. See *Crutwell* v. *Lye*, 17 Ves. 335. 1 Fonb. Eq. 265, 5th edit. 1 Bac. Abr. 645, Gwill. edit. *Conditions* (K).

II. *Bonds of resignation.*

In *Fytche* v. *Bishop of London*, it was determined by the court of Common Pleas, that general bonds of resignation were legal; which judgment, upon a writ of error, was affirmed in the King's Bench: but upon a writ of error that judgment was reversed by the House of Lords. *See Cunningham's Law of Simony;* 1 *Bro.* C. C. 96; 3 *Burn's Ecc. Law*, 356. 6*th ed. Mitf. Plead.* 157. 3*d edit.* This decision, which was brought about by the great eloquence and ability of Lord Chancellor Thurlow, and the honest zeal of the bishops, was contrary to the opinion of all the judges, except Eyre, B. *See Dr. Watson's (Bishop of Llandaff) Life of Himself, vol.* 1. 180. The principle of this decision is not generally favoured, or likely to be extended. Thus a bond given by an incumbent to the patron on presentation to reside on the living, or to resign if he did not return to it after notice, has been adjudged good. *Bagshaw* v. *Bossley*, 4 T. R. 78. So in *Partridge* v. *Whiston*, 4 T. R. 359, the court of King's Bench adjudged that a bond with a condition to resign on the patron's son coming of canonical age, was good: they said that, as the case was not precisely similar to the *Bishop of London* v. *Fytche*, they were bound by the established series of precedents. See *Durston* v. *Sandys*, 1 Vern. 411; *Peele* v. *Earl of Carlisle*, 1 Stra. 227; *Peele* v. *Capel*, 1 Stra. 534. *Grey* v. *Hesketh*, Ambl. 268. 3 Burn's Eccles. Law, 354, 6th edit.; *Newman* v. *Newman*, 4 Maul. & Selw. 66; Lord *Kircudbright* v. Lady *Kircud-*

tion of record, or in writing sealed; yet the jury may help a man, where the judges will take their verdict at large: of chattels he may.

bright 8 Ves. 61; *Dashwood* v. *Peyton*, 18 Ves. 36. 46; 6 Bac. Abr. 192. *Simony* (B), &c. 1 Ibid. 644. *Conditions* (K); 1 Fonb. Eq. 232.

III. *Marriage Brocage Bonds.*

Though these bonds are good at law, yet in equity they are justly condemned as introductive of infinite mischief, *Law* v. *Law*, 3 P. Wms. 394; but equity does not interpose on account of any particular injury done to the party, who is *particeps criminis*, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation, *Law* v. *Law*, Cas. Temp. Talb. 132; 2 Eq. Ca. Abr. 187, pl. 2; *Debenham* v. *Ox*, 1 Ves. 277; and therefore such a bond is in no case to be countenanced. Thus where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married *J. S.*, then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having £2,000 portion, and the man being sixty years of age, and having seven children. *Drury* v. *Hooke*, 1 Vern. 412; 2 Ch. Ca. 176. *See Ch. Rep.* 87. *Tothill*, p. 27, *edit.* 1820. So a bond for payment of £500, for procuring a marriage between persons of equal rank, fortune, &c. was, on appeal from the court of Chancery, declared by the House of Lords to be void; because such bonds to match makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; for marriage ought to be procured by the mediation of friends and relations; and such bonds would be of evil example to executors, guardians, trustees, servants, and others, who have the care of children. *Hall* v. *Potter*, Show. P. C. 76; *Smith* v. *Aykwell*, 3 Atk. 566. So a bond to *give* money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to *forgive* a sum of money, in the same event, must be ill also. *Hamilton* v. *Mohun*, 1 P. Wms. 120. So wherever a mother or father, or guardian, insist upon a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity. Thus *J. S.*, by will, gave his neice £1,200, she married, but, antecedently to the marriage, her father took a bond from the then intended husband to pay him £200 in case the daughter should die without issue male in the life-time of her husband; the daughter died without issue male, living her husband; the father sued the husband at law upon the bond, and the husband on a bill was relieved against this bond; for, it appearing that no money was paid, nor any consideration for entering into it, the court took it to be in the nature of a marriage brocage bond, and therefore ordered it to

The words "*proviso*" makes a condition; but when it depends upon another sentence, or has reference to another part of the deed, it makes no condition, but a qualification [79]

be delivered up. *Anon.* 2 Eq. Ca. Abr. 187, pl. 1; *Lamlee* v. *Hanman*, 2 Vern. 466, 499; *Hamilton* v. *Mohun*, 1 P. Wms. 118; Salk. 158; 2 Vern. 652; Gilb. Chan. 297; 1 Eq. Ca. Abr. 90. pl. 6; 10 Mod. 447; *Keat* v. *Allen*, 2 Vern. 588; *Anon.* Prec. Chan. 267; *Tooke* v. *Atkins*, 1 Vern. 451; *Gale* v. *Lindo*, 1 Vernon's Rep. 475; *Kemp* v. *Coleman*, 1 Salk. 156; *Cole* v. *Gibson*, 1 Ves. 503; Belt's Supp. 211; *Hylton* v. *Hylton*, 2 Ves. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompense, it is void, being procured by coercion, while he is under the control of his father. *Treat of Eq. b.* 1. *ch.* iv. *s.* 10. *Fonbl. 5th edit.* 260. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party, *Shirley* v. *Martin*, 1 *Fonbl.* 264 n, 1: 3 P. Wms. 74; *Cole* v. *Gibson*, 1 Ves. 536; *Morse* v. *Royal*, 12 Ves. 364, 373; *Crowe* v. *Ballard*, 1 Ves. jun. 220; and consequently the party entitled to relief in a court of equity cannot release his right to a remedy, and thereby indirectly effect a confirmation; as it would be contrary to the maxims — that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. *Sed vide* 1 Ves. 507. And the court will decree a gratuity actually paid to be refunded: Thus where a servant maid prevailed with her master's niece, who was about fifteen years old, and lived in the same house with him, and was entitled to a good fortune, to marry his journeyman, without the consent or knowledge of her uncle; and for the good offices she was to do the journeyman in that affair, he had given her a bond of £100, conditioned to pay her fifty guineas at six months end; and after he had gained the niece's good will, by the help of this maid, and the young lady had been prevailed on to go with him in a hackney coach to be married, he gave the maid fifty guineas more, the marriage was had: and afterwards the maid servant married, and the bond not being paid, was put in suit, and judgment obtained on it; and a bill was brought against the defendants, the maid servant and her husband, to be relieved against this bond, and to have the fifty guineas repaid; because the bond was entered into, and the money given for no good consideration, but only on account of this marriage brocage. And the Master of the Rolls decreed the

or limitation of the sentence, or of that part of the deed, as "provided that the person of the grantee shall not be "charged."

bond to be given up, and satisfaction to be acknowledged on the judgment, and the fifty guineas received to be repaid; and if it were not done on service of the order, the defendants were to pay costs; and this, notwithstanding the husband of the servant maid, insisted by his answer, that he looked upon the bond and fifty guineas as his wife's fortune, and had married her in prospect of it; and this decree was affirmed by Lord Keeper Wright. *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Smith* v. *Bruning*, 2 Vern. 392. S. C.

IV. *In restraint of marriage.*

It was a rule in the civil law, that marriage ought to be free, 3 *Ves.* 96, and the same policy has obtained in equity; and therefore, in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond; the court will decree this bond to be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion. *Key* v. *Bradshaw*, 2 Vern. 102; 1 Eq. Ca. Abr. 88. So, if *A.*, being a widow, gives a bond to *B* for £20, if she should marry again, and *B* gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up. *Baker* v. *White*, 2 Vern. 215; *Woodhouse* v. *Shepley*, 2 Atk. 535. See *Lowe* v. *Peers*, 4 Burr. 2225; *Bateman* v. *Wells*, Tothill, p. 25, ed. 1820. So, where a bequest of an allowance to a feme covert was made on condition that she lived apart from her husband, the condition was held *contra bonos mores*, and void. *Brown* v. *Peck*, 1 Eden. 140. *Vide* Atherley's note, Shep. Touch. 132 *x*.

V. *To a kept mistress.*

Both courts of law and equity makes a distinction, when it *appears* that these bonds are given as a reward for past cohabitation, and when it appears that they are given as an inducement to future concubinage: and therefore,

1st. *Præmium pudicitiæ.* A bond purporting to be in *consideration of cohabitation had* between the obligor and obligee, was held to be good; *per Clive*, *Bathurst* and *Gould*, Justices, (absent Chief Justice Wilmot) without hearing the other side. *Clive*, *Justice;* I am in a court of common law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good; suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity, it would be postponed to creditors. Sir Joseph Jekyll,

He who has interest in a condition, may fulfil the same for safeguard of himself.

Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is *præmium pudoris*, a court of equity will not relieve against such a bond. This condition is incapable of an explanation to make the bond an illegal act. *Bathurst, Justice;* where a man is bound in honour and conscience, God forbid that a court of law should say the contrary; and wherever it appears that the man is the seducer, the bond is good. Bracton says, when a man cohabits with an unmarried woman, it is *legitima concubina*, and *Exodus*, cap. xxii. v. 16. "*If a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife.*" See also *Deuteronomy*, cap. xxii. v. 28, 29. "If a man find a damsel who is a virgin not betrothed, and lay hold of her, and lie with her, *and they be found;* then the man who laid with her, shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days." Honour and conscience ought to bind every man in point of law. In an action in the King's Bench, upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted that he had debauched the plaintiff, by promising her marriage; this cause being tried before me on the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and £500 damages, which I thought right; the court of King's Bench approving of my opinion, refused to set aside the verdict, and thought £500 damages were little enough. *Gould, Justice;* the court may take this for a lawful and conscientious consideration; we must presume, that the defendant has done what in honor and conscience he ought to have done, and that he thought himself a wrong doer, and gave the plaintiff this bond to make her amends. *Turner* v. *Vaughan*, 2 Wils. 339.

Formerly it has been held in a court of equity, that if it were charged in a bill, and proved in evidence, that the defendant was a common strumpet, and commonly dealt and practised after that manner, and was used to draw in young gentlemen, the court would relieve against a bond given to such a woman. *Whaley* v. *Norton*, 1 Vern. 484. Though it seem, even in case the woman had been a prostitute, the court would not formerly relieve the party himself, who was culpable, though it was otherwise, when his executor sought relief. *Matthew* v. *Hanbury*, 2 Vern. 187; *Bainham* v. *Manning*, 2 Vern. 242; *Bodly* v. ———, 2 Ch. Ca. 15; 19 Vin. Abr. 301. E. However, the liberality of modern judges has softened this severity, on the ground, that a provision enables a woman in such an unfortunate situation, to lead a course of life, more conducive to her happiness. A

Between the parties, it is not requisite the condition be performed in every thing, if the other party do agree; but to a stranger it must.

voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor. *Hill* v. *Spencer*, Ambl. 641. Lord Camden, in delivering his judgment, said, I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the *securities* being given *previous* to the *cohabitation; a consideration, which being* turpis *in its nature, the court has relieved against them.* In this case, the bond was not given for a consideration, but was voluntary. *H.* had resort to her for near two years before he gave her the bond. Past service could not be a consideration at law, and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think, that in the case of a voluntary bond, the obligee being a common prostitute, is, of itself, a sufficient ground for relief. And according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, a voluntary bond during cohabitation, to a woman, previously of a very loose life; and soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation; on a bill by the executor to have the bonds delivered up, was, by the court of Exchequer, dismissed with costs; the former being considered unimpeached; and the latter void at law, as *pro turpi causa*. *Gray* v. *Mathias*, 5 Ves. 286. So a bill brought to be relieved against a bond given *to a housekeeper for secret service*, was dismissed. *Bainham* v. *Manning*, 2 Vern. 242.

If the consideration be *præmium pudicitiæ pellicis*, equity will not *assist* the obligee, if she knew the obligor were a married man. Thus, a bill for payment of a sum of money, and an annuity secured by a deed poll by defendant to plaintiff, who being a young woman, came to live in the family of defendant, then a married man, as a companion to his sister, and who, by continuing to live with him, occasioned a separation from his wife, was dismissed, but without costs, on account of her previous good character. *Priest* v. *Parrot*, 2 Ves. 160.

But it seems that equity will not in any case relieve the obligor on his own application: as where he had seduced his wife's sister, and had several children by her, and had given her a bond for payment of money, as a provision for her and the children, the bond being put in suit against him, he brought a bill, suggesting that the bonds were not

If the obligee be party to any act, by which the condition cannot be performed, then the obligor shall be discharged; so he shall be by the act of God.

given for money lent, or any valuable consideration, Lord Somers decreed the payment of what was due on the bond for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs: and his Lordship said it was a pity he could do no more. *Spicer* v. *Hayward*, Prec. Chan. 114; 1 Fonb. Eq. 229.

These bonds being merely voluntary, even though *præmium pudicitiæ*, the payment of them, out of the personal estate, will be postponed by a court of equity, until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any. *Jones* v. *Powell*, 1 Eq. Ca. Abr. 84. pl. 2; *Cray* v. *Rooke*, Ca. Temp. Talbot, 153, *Harris* v. Marchioness of *Annandale*, 2 P. Wms. 432; 3 Bro. Par. Ca. 445; 1 Eq Ca. Abr. 87. pl. 6. *S. C.* Thus, where *A.* having a wife who lived separate from him, afterwards courted and *married* another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife, that the former was alive, *A.* in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her £1000 at his death, and died, not leaving assets to pay his simple contract debts; Sir Joseph Jekyll held, that if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife; after such time as she knew the first wife was living, and to induce her to continue with *A.*, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. Lady *Cox's* case, 3 P. Wms. 339; 2 Eq. Ca. Abr. 182, pl. 6. 258, pl. 13. So, where there was a bond by *S. C.*, upon articles, in consideration of £10, which imported a direct assignment by Mr. *H.* of his wife, who was herself a party, *to the use* of *S. C.*, with covenants for quiet enjoyment, and further assurance; upon a bill to have this bond postponed, and to be relieved against an assignment and bill of sale of goods made by *S. G.* in trust, and for the benefit of Mrs. *H.;* as to creditors, the bond and bill of sale were set aside, because they appeared to be for undue consideration. *Robinson* v. *Gee*, 1 Ves. 254. But a bond of this kind must be paid before legacies, for although voluntary, yet it transfers a right in the life of the obligor, and legacies arise only from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's life-time. *Fairebeard* v. *Bowers*, 2 Vern. 202; Prec. Chan. 17. *S. C.; Jones* v. *Powell*, 1 Eq. Ca. Abr. 143, pl. 15, 16; Gilb. Chan. 297—8; *Cray* v. *Rooke*, Cas. Temp. Talb. 155; 2 Eq. Ca. Abr. 182. pl. 7.

Where the first act in the condition is to be performed by the obligee, and he will not do it, there the obligation is not forfeited.

But the bond or deed must be executed, for in matters *executory*, even on the consideration *præmium pudicitiæ*, the court of Chancery will not compel the party or his executors, to fulfil an agreement to provide for a forsaken kept mistress. *Whaley* v. *Norton*, 1 Vern. 483. Thus, a general demurrer was allowed to a bill against the widow and executrix of the testator, to enforce an agreement by him when single, first by a letter to the plaintiff, and afterwards by a parol agreement with her, to settle an annuity on the plaintiff, who was separated from her husband, and a deed of separation was executed by them, in which the husband gave up all claim to any property the plaintiff might acquire. After this separation, the plaintiff was induced to live with the testator, and lived with him for several years; when he, being about to marry, communicated his intention to a lady, a friend of the plaintiff, requesting her to break the matter to the plaintiff, and expressing an intention to settle upon her £100 a year. The testator wrote afterwards to the plaintiff, enclosing her *l*25, which he said, "I look upon as a quarter of the annuity I intend securing to you for your life, which shall be regularly paid at the four usual quarters. I shall send you *l*50 in the course of a few days, and will send you the same sum at Christmas, to purchase what you may have occasion for to make you comfortable." In consequence of the proposal of the annuity, it was finally agreed between the plaintiff and the testator, that the connection should cease, and that the plaintiff should not in any respect, impede or endeavour to prevent the intended marriage with the defendant; and that the plaintiff should in future live a retired, chaste, and virtuous life, and should so conduct herself, as in no respect to interfere with the connection, by way of marriage, which the testator was about to form; every one of which stipulations the plaintiff performed; and the testator promised or agreed to settle upon the plaintiff *l*100 *per annum* for life. *Sir Thomas Plumer, Vice Chancellor.* This bill states only an agreement to secure an annuity, and that agreement was not founded on any good, meritorious, or valuable consideration; it was therefore voluntary, and I take it to be a clear rule in this court, that a bill does not lie to enforce a voluntary agreement. It has been contended, that there was a moral obligation to provide for this woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from her husband, she was not absolved from her marital obligation to live chastely; and her connection with the testator, was a high offence by the divine law, as well as against society. Whether, if any annuity had been settled, the court would take it from her; or whether the court would refuse her any assistance, as in *Priest* v. *Par-*

Where no time is set, if the condition be for the good of a stranger, or of the obligee, then it is to be performed within convenient time; if for the good of the obligor at

rot, it is not necessary to consider. *Matthews* v. *L——e*, 1 Madd. Rep. 558, 563.

But if there be any *fraud* practised on the unfortunate woman, a court of equity would afford her relief: thus, where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement upon her of £30 a year for life, out of an estate which was not his; the court decreed him to make it good out of an estate which he had of his own, and this decree was afterwards affirmed on appeal to the House of Lords. *Carew* v. *Safford*, 1 Eq. Cas. Abr. 31, pl. 4. And where Sir W. B., having seduced Mrs. O., then a young lady of about fourteen years of age, of a good family, and entitled to £12,000 fortune, settled on her £300 *per annum*, for years; but the estate was incumbered, and, Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly. *Ord* v. *Blacket*, cited in Marchioness of *Annandale* v. *Harris*, 1 Eq. Ca. Abr. 87, pl. 6; 2 P. Wms. 433; 19 Vin. Abr. 303, pl. 2.

Under the maxim, that *equity relieves against accidents*, Grounds and Rudiments of Law and Equity, 87, it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond, lose the deed or by accident, they may have remedy against the grantor or obligor in equity. *Underwood* v. *Stanley*, 1 Ch. Ca. 78. 13 Vin. Abr. 104, pl. 4; 20 Vin. Abr. 101, pl. 2; Lat. 24; 2 Ch. Ca. 30. Though 1 Eq. Ca. Abr. 92, pl. 4. adds, "*Quære*, for these matters are discretionary:" and there certainly are some *old* cases *contra*. *Miller* v. *Reames*, 1 Rol. Abr. 375. *Chancerie* (Q). pl. 1. *Vincent* v. *Beverly*, Noy, 82; Pop. 205, 206. See *Toulmin* v. *Price*, 5 Ves. 235. Though in a more modern case where *J. S.*, a little before his death, granted an annuity of 30*l. per annum* to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration, and no *turpis contractus* shall be presumed, unless proved. *Lightebone* v. *Weedesh*, 1 Eq. Ca. Abr. 24, pl. 7; 1bid. 93. pl. 5.

2d. *Præmium Concubinati (a)*. Though a court of law will not inquire into the consideration of a bond, yet if it appear to be illegal on the face of it, the court cannot sanction the claim: thus a bond reciting, that the parties had agreed to *live together*, therefore the obligor had agreed to find the woman meat, drink, washing, lodging,

(a) See Taylor's Elements of Civil Law, 273.

any time during their lives. The word "immediately" shall not have such a strict construction, but that it shall suffice, if it be done in convenient time.

&c.; and to *leave her an* annuity of £60 a year, *if* HE quitted her, or she outlived him: and if they had any *child*, he was to take care of and *provide* for it. But *if* SHE should leave him, or go to another man, then he should *not* be obliged to provide for her any longer, or leave her any annuity. *Per Lord Mansfield.*—It is the price of prostitution, *præmium prostitutionis:* for if she *becomes virtuous*, she is to *lose* the annuity. It appears clearly upon the condition, that the bond is *illegal* and *void*. *Walker* v. *Perkins*, 3 Burr. 1568.

But after a verdict at law upon a bond *præmium concubinati*, against the obligor, *a demurrer was allowed* to a bill to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife; and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery. *Franco* v. *Bolton*, 3 Ves. 368.

VI. *Bonds for gaming debts.*

By the 9th *Ann.* c. 14. all *bonds* and *other securities*, given for money won at play, or money lent at the time to play with, are utterly void. See further, 4 *Bla. Com.* 172; 1 Fonb. Eq. 233. 1 Rev. Code of 1819, p. 561. But a man has been allowed to recover money which he had lent to the defendant to game with, and at the same time won it of him; for the word *contract* was not mentioned in the statute 9 Ann. c. 14. *Barjean* v. *Walmsley*, 2 Str. 1249. So, where plaintiff lent defendant money to bet at a horse race, he was allowed to recover. *Aleinbrook* v. *Hall*, 2 Wils. 309. See also *Wettenhall* v. *Wood*, 1 Esp. N. P. C. 18; *Robinson* v. *Bland*, 1 Bla. 234, 256; 2 Burr. 1077; *Faikney* v. *Reynous*, 4 Burr. 2069; *Aubert* v. *Maze*, 2 Bos. & Pul. 371.

VII. *Of relief at law, and in equity, on an illegal transaction, where the claimant is* particeps criminis.

1st. At law.—Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, or if one recovers money *malâ fide*, by suit in an inferior court, he may bring *indebitatus assumpsit* for the money. *Moses* v. *Macfarlan*, 2 Burr. 1005; 1 Bl. Rep. 219. S. C. But where one *knowingly* pays money upon an illegal consideration, or where the act is in itself immoral, or a violation of the general laws of public policy, he is *particeps criminis*, and he shall not have this action, for he parted with his money freely, and *volenti non fit injuria*. *Tomkins* v. *Bernet*, 1 Salk. 22; Skin. 411, S. C. For where both parties are equally offenders against such laws, *potior est conditio defendentis*, *Smith* v. *Bromley*, Doug. 698; not because the defendant is more favored, but because the plaintiff must draw his justice from pure fountains. Therefore though if A. agree to give B.

If a man be bound to pay money, or farm rent, he must seek the parties: But if he be bound to perform all payments, if he tender his rent on the land, it suffices.

money for doing an illegal act, as if a wager be made on a boxing match, *B.* cannot, (though he do the act) recover the money by an action; yet if the money be paid, *A.* cannot recover it back again. *Webb* v. *Bishop*, Bull. N. P. 132, 7*th edit.* See *Lacaussade* v. *White*, 7 T. R. 535; *Howson* v. *Hancock*, 8 T. R. 575; *Vandyck* v. *Hewitt*, 1 East. 96.

2d. In equity:—*Equity* extends relief to *particeps criminis*, on grounds of public policy, *Hatch v. Hatch*, 9 Ves. 292, 299; *Shirley* v. *Martin*, cited 11 Ves. 536, 537. 9 Ves. 299; therefore it is no objection that the plaintiff himself was a party in the illegal transaction, because the public interest requiring that relief should be given, it is given to the public through the plaintiff, though he be himself *particeps criminis*. Lord *St. John* v. Lady *St. John*, 11 Ves. 535, 536. Thus *A.* by his interest with the Commisioners of Excise, got an office in that branch of the revenue for *B.*, who, in consideration thereof, gave a bond to *A.*, to pay him £10 *per annum*, as long as *B.* enjoyed the place; equity relieved against the bond. *Law* v. *Law*, 3 P. Wms. 391; Cas. Temp. Talb. 140; 2 Eq. Cas. Abr. 187, pl. 10. So money advanced by the plaintiff to the defendant to procure him a commission in the marines, was decreed to be refunded with interest, the plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged: first, upon grounds of public policy; and, secondly, as the plaintiff had been imposed upon, the defendant knowing that he was incapable of holding the commission. *Morris* v. *M'Cullock*, Amb. 432; 2 Eden, 190. A private agreement obtained by a father from his son, in derogation of an allowed sale, of the command of a post office packet, by the father to the son, duly registered in the name of the son, upon a promise by the officers of the post office, that if he would convey the vessel to the son, they would appoint the son commander of the packet, in the room of his father, on a bill filed by the widow and executrix of the son against the executors of the father, an account was decreed. *Per Sir William Grant*—That the agreement, which is impeached by this bill, was illegal, as being a fraud upon the post office, cannot be doubted after the cases of *Hartwell* v. *Hartwell*, 4 Ves. 811; *Thompson* v. *Thompson*, 7 Ves. 470; and more particularly *Parsons* v. *Thompson*, 1 Hen. Bla. 322; *Garforth* v. *Fearon*, Ibid. 327. I think it illegal also upon the ground of its being a fraud on the provisions of the ship registry acts. Stat. 26 *Geo.* 3 *c.* 60; Stat. 34 *Geo.* 3 *c.* 68. The father therefore could never have enforced it; but my doubt was, whether the father having received the profits, this court would decree them to be ac-

[80] If the feoffee or feoffor die before the day of payment, the tender shall be to the executor, although the heir of the feoffee enter, if the heir be not named. *See* ASSIGNEE in ASSIGNMENT.

The money must be tendered so long before sun-set, that the receiver may see to tell it.

counted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis*, should prevail; as both are guilty of a violation of the law. Upon an examination of the cases, however, I think the plaintiff's are entitled to the relief sought by the bill. Courts both of law and equity have held, that two parties may concur in an illegal act, without being deemed to be in all respects *in pari delicto*. I consider this agreement, as substantially, the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris* v. *M'Cullock*, Amb. 432, the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4, a marriage brocage case, the party obtaining money by the sale of her influence must have been considered as more criminal than the purchaser; for she was decreed, first, at the Rolls, and afterwards upon appeal, to refund the sum which she had received. There is no case calling in question that decision. Lord Thurlow, indeed, in *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. (see 547-8, and Eden's notes) seems to have thought, that in all cases where money was paid for an illegal purpose, it might be recovered back, observing, that "if courts of justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before." It is, however, unnecessary, in the present case, to lay down so broad a rule. These parties are not, I think, *in pari delicto*, by entering into this illegal agreement. It was not confirmed; if indeed it admitted confirmation, by signing the account. The account must therefore be taken as if the son had been, from the beginning, the actual owner of the packet, and entitled to all its earnings. As the plaintiff chooses to open the account, the defendants are not bound by any deductions which they agreed to make, if they can establish a right to the sums deducted. *Osborne* v. *Williams*, 18 Ves. 379.

The profits of a partnership in underwriting, made illegal by the stat. 6 *Geo.* 1. *c.* 18. *s.* 12. cannot be recovered at law, *Sullivan* v. *Greaves*, Parke's Insurance, 8; *Michell* v. *Cockburn*, 2 Hen. Bla. 379; nor be the subject of account in equity. *Knowles* v. *Haughton*, 11 Ves. 168; contra *Watts* v. *Brooks*, 3 Ves. 612, but now over-ruled.

To pay part of a sum at the day, cannot be satisfaction for the whole sum; as a horse or a robe is. But before the day, or at another place at the day of the request, and acceptance of the obligee, is full satisfaction.

An acquittance is a good bar though nothing be paid. *See Co. Litt.* 373 *a.*

In all cases of conditions, for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he who made the tender is discharged for ever.

And the manner of the tender, and payment shall be directed by him who made it, and not by him who did accept it, as that he paid the sum in full satisfaction, and that he accepted thereof in full satisfaction.

Where a man is bound to pay money, to make a feoffment, or renounce an office, or the like, and no time is limited when he shall do it, then upon request, he is bound to perform it, in so short a time as he can. [81]

But where the time is limited, if he refused before the day, it is of no consequence, if he be ready to perform it at the day.

Where a covenant or condition is, to marry or enfeoff a stranger by such a day, the refusal of the stranger is no plea, as that of the obligee is. The obligee is to be ready on the land at his own peril: a stranger must be requested; if he refuse, the obligation is forfeited; wherefore it is good to have these words, "If the stranger do thereunto assent."

For the doctrine of conditions, see Co. Litt. 201 *a. n.* (1) *Shep. Touch. ch.* 6.

ENTRY.

The determination of an estate, is not effected, before entry.

When any person will enter for a condition broken, he must be seised in the same course and manner, as he was when he parted with his possession.

It behoves such persons as will re-enter upon their tenants, to make a previous demand of the rent.

If the lessor demand before he die, his heir may enter.

If the lessor distrain he may not re-enter.

[82] The lessor may accept of the rent, and yet re-enter: But if he receive the next rent, he may not, for that establishes the lease.

Entry into one acre, in the name of more, is good, if the land do not extend into two counties.

By the entry of the husband, the freehold shall be in the wife: And so of the like.

In gavelkind land, the eldest son only, shall enter for the breach of a condition.

See further concerning entry, Co. Litt. 202 *a*; 240 *b*.

DEMAND.

The land is the place where the rent is to be paid and demanded, if there be no other place appointed.

And there the lessor himself, or his sufficient attorney, a litle before sun-set, in the presence of two or three sufficient witnesses shall say, "Here I demand of J. B. ten pounds due to me at the feast of, &c. for a messuage, &c. which he holds of me in lease by indenture, &c." and there remain the last day the rent is due to be paid, until it be so dark, that he could not see to tell the money.

CHAP. XL. [83]

WARRANTIES. *(a)*

THERE are three sorts of warranties; lineal, collateral, and by disseisin.

Warranty lineal, is where a man by his deed binds him and heirs to warranty, and dies, and the warranty descends to his issue.

Warranty collateral, is in another line, so that he to whom it descends cannot convey the title which he has in the tenements, by him who made warranty *(b)*.

Warranty by disseisin, is where he who has no right to enter, enters, and makes a warranty; this is by disseisin, and bars not.

Lineal warranty, bars him who claims a fee-simple, and also fee-tail, with assets in fee: If he sell, his son may have a *formedon*.

Collateral warranty, is a bar to both, except in some cases, which are remedied by statute, as warranty by tenant by the curtesy, except the heir has an equivalent by descent from the same tenant.

Tenant in dower, for life, remedied, but do bar him in reversion. [84]

A warranty descends always to the heir at the common law, viz. the eldest son *(c)*, and follows the estate, and if the estate may be defeated, the warranty may also *(d)*.

(a) Warranties, in England, have been almost entirely superseded in practice, by covenants, which in their usual form, binding the *heirs*, *executors*, and *administrators* of the covenantor (as far as assets extend) are deemed a better security than any warranty. See 2 *Bl. Com.* 304.

(b) Lord Chancellor Cowper said that "a collateral warranty was certanly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompense; yet he could not find that Chancery had ever given relief in it." Earl of *Bath* v. *Sherwin*, 10 Mod. 3. 4.

(c) *Litt. s.* 718; *Co. Litt.* 376 *a* 386 *b*.

(d) *Shep. Touch.* 201; *Litt. s.* 745. 747. 748; *Co. Litt.* 391 *b*.

It bars not the second son in gavelkind, although all the sons shall be vouched, and not the eldest son alone: yet he only shall be barred.

To plead a warranty against him that made it, or his heirs, is called a Rebutter.

Where fee or freehold is warranted, the party shall have no advantage, if he be not tenant.

Where a lease for years is warranted, it shall be taken by way of covenant, and good if he be ousted.

The feoffor by the words of *dedi & concessi (e)* shall be bound to warranty during his own life *(f)*.

(e) I gave and granted.

(f) A *warranty* may be made upon any kind of conveyance, *Co. Litt.* 385 *a;* 7 Bac. Abr. 227. *Warranty* (B); and may be annexed to freeholds or inheritances, *Co. Litt.* 378 *b.* 389 *a*; *Gilb. Ten.* 176; either lying in livery or in grant, and either corporeal or incorporeal. *Co. Litt.* 366. *a;* but it cannot be annexed to chattels real or personal, and if a man warrants chattels real or personal, the party shall have an action of covenant, or an action on the case, or an action of deceit. *Co. Litt.* 101 *b.* 389 *a.*

In modern conveyances by deed, a warranty is never inserted, because covenants are more beneficial to both parties; for if the covenantor, covenant for himself and his heirs, it is then a covenant real, and descends upon the heirs, 2 Saund. 136. who are bound to perform it, provided they have assets by descent, but not otherwise; and the *executors* and *administrators* are bound by every covenant, and also in a bond without being named, Dyer, 14, pl. 69. unless it be such an act as is to be performed *personally* by the covenantor, and there has been no breach before his death. Co. Litt. 209 *a;* Cro. Eliz. 553; so that a covenant in which the heir is named, is a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor, who usually *covenants* only, for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. 2 Bl. Com. 304.

CHAP. XLI. [85]

COVENANTS.

Covenants are of two sorts; expressed by word sin the deed, or implied (*a*) by the law. A covenant in deed is an agreement made by a deed in writing, and sealed between two persons, to perform some things; for no writ of covenant is maintainable without such a speciality, but in London, &c.

When a covenant extends to a thing in being, parcel of the demise, or the thing to be done by force of the cove-

(*a*) Thus the words "grant" or "demise" in a lease for years, create a covenant in law for quiet enjoyment of the lands demised, during the term; and if the lessee be evicted by the lessor, or by any person claiming a lawful title to the land, he may bring an action thereupon. 4 *Co.* 80 *b;* 5 Co. 17 *a* 4. *Butl. n. Co. Litt.* 384 *a* (1). So in a lease for years, the words "yielding and paying" create a covenant for payment of the rent. 1 *Roll. Abr.* 519. *Cov.* pl. 10; 6 *Vin. Abr.* 379, *pl.* 10; *Bull N. P.* 157, *Bridgman's edit;* 2 *Bac. Abr.* 65 *Cov.* (B); *Com. Dig. Cov.* (A 4.) The distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly. 3 *Burr.* 1639. 4 *Cru. Dig.* 449; 2 *Bac. Abr.* 65. Hence an express covenant to pay the rent, is binding on the tenant, both at law and in equity, in every event, and in every state and condition of the premises; *Monk* v. *Cooper*, 2 Stra. 763; Because the party by his own contract creates the duty or charge upon himself, and he might have provided against it by his own contract. *Paradine* v. *Jane*, Sti. 47, 48; Allen, 26, 27. And so if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. *Dyer*, 33 *a;* 18 *Vin. Abr.* 515. *pl.* 10. And it now appears to be settled, both in law and equity, that if a tenant covenant to *repair*, damage by fire excepted, he cannot be relieved from the payment of *rent*, if the premises are destroyed by fire. *Belfour* v. *Weston*, 1 T. R. 310; *Hase* v. *Groves*, 3 Anst. 687; *Holtzapffel* v. *Baker*, 18 Ves. 115; *Et Vide* 2 Eden, 219.

The doctrine of implied covenants is confined to land property. Hence, if *goods* be *demised* by indenture, for years, and the lessee be evicted, covenant does not lie upon the word "demise;" for the law does not create a covenant, for a personal thing. Com. Dig. *Covenant* (A 4); 1 *Selwyn's Ni. Pr.* 480, 2*d edit.*

nant, is *quodammodo* annexed, or appertaining, to the thing demised, and goes with the land, it shall bind the assignee although he be not named: As to repair the houses, it shall bind all that shall come to the same, by the act of the law, or by the act of the party (*b*).

But if the covenant concern the land, or thing demised in some sort, the assignee shall not be charged, although he be named; as to make a wall at another person's house, or to pay a sum of money to the lessor, or to a stranger; but the lessee, his executors and administrators shall be charged.

[86] If the covenant extend to a thing which had no being, but is to be made new upon the demised land, it shall bind the assignee, if he be named, because he will have the benefit of it.

If a man make an under-lease for years, and the lessee covenant and grant to pay, &c. to the lessor, his heirs and assigns, yearly during, &c. ten pounds, his executor shall have it (*c*),

On a covenant in law upon a demise, or grant, the assignee in deed, or in law may have a writ of covenant.

An obligation to perform all covenants and grants, is forfeited on the breach of a covenant in law.

A covenant in law is not broken, but by an elder title (*d*).

(*b*) In covenants concerning the inheritance, the heir shall have an action of covenant for breach, though he be not named, 2 *Lev.* 92.

(*c*) 1 *Vent.* 161. Because the lease from which the underlease was derived, devolved to the executor, the rent, as accessory, shall follow the principal. But if a lease be made by the owner of the inheritance, reserving the rent at Michaelmas, or ten days after, if the rent be not paid at Michaelmas, and before the ten days are expired, the lessor dies, his heir, and not his executor shall have the rent. 10 *Co.* 127 *b.* So if the lessor die on the day on which the rent is to be paid, after sun set and before midnight, the heir, and not the executor, shall have the rent. 3 *Bac. Abr.* 63; 6 *Bac. Abr.* 23. *Co. Litt.* 202 a. (1). 1 *Saund* 287; *Salk.* 578.

(*d*) Vide *Noke's* case, 4 Co. 80 b. 3. The eviction must be by one who has a prior title, though it is otherwise, it has been said, where there is an express covenant, 2 *Leon.* 104: *Cro. Eliz.* 214; 2 *Brownl.*

A covenant in law may be qualified *(e)*, by the mutual consent of the parties *(f)*.

161. though it seems now to be settled, that an express covenant, in the most general terms, shall be restrained, to lawful interruptions. 3 T. R. 584; Lofft. 460; Vaugh. 118; 2 Bac. Abr. 65; *Vide* Wms. n. 1 Saund. 322 (2).

(e) Thus an express covenant, will qualify the generality, of an implied covenant, and restrain it, so that it shall not extend farther, than the express covenant. *Noke's* case, 4 Co. 80 b. Cro. Eliz. 674; 1 Mod. 113; *Gainsford* v. *Griffith*, 1 Saund. 60. and n. (2); 1 Ves. 101.

(f) The usual covenants upon the sale of an estate in fee simple are, that the vendor is seised, and has power to convey in fee; for quiet enjoyment; that the estate is free from incumbrances; and for farther assurance. The vendor, if he was himself a purchaser for valuable consideration, delivering or covenanting to deliver, his title-deeds, covenants against his own acts only; if his title be by descent, by devise, or otherwise, as a purchaser, not for valuable consideration, he covenants against the acts of the last purchaser; or, at least, of the person immediately preceding him. See *Loyd* v. *Griffith*, 3 Atk. 264; *Wakeman* v. *The Duchess of Rutland*, 3 Ves. 233. 504; 8 Bro. Parl. Cas. 145; 15 Ves. 263, n.

The usual covenants upon the sale of a leasehold estate are, that notwithstanding any act done by the *vendor*, or the person under whom he *beneficially* claims, the lease is valid; not forfeited, surrendered, or determined, or become void or voidable; that the vendor has, or the assigning parties, have, good right to assign; that the rent has been paid, and the covenants performed, up to a certain time; for quiet enjoyment during the term; free from incumbrances; and for further assurance. The *assignee* is bound to covenant with the assignor, that he will pay the rent, and perform the covenants in future; and indemnify the assignor, from the payment and performance thereof, although it be not mentioned in the conditions of sale, *Pember* v. *Mathers*, 1 Bro. C. C. 52; or although the assignment be, by an executor or trustee, not beneficially interested in the purchase money, who only covenants that he has not incumbered, *Staines* v. *Morris*, 1 Ves. & B. 8.

When an estate is sold by trustees or executors, it is the usual practice for the parties beneficially interested in the purchase money, to covenant for the title, "notwithstanding their own acts, and those of the person under whom they claim, but so nevertheless as to be answerable in damages only rateably, to the amount of the purchase money received by each respectively."

A covenant being a part of a deed is subject to the general rules of exposition of all parts of deeds: As, 1. To be always taken most

CHAP. XLII.

How Chattels Personal may be Bargained, Sold, Exchanged, Lent, and Restored.

A Contract is properly where a man for his money, shall have by the assent of another, certain goods, or some other profit at the time of the contract, or after.

[87] In all bargains, sales, contracts, promises, and agreements, there must be *quid pro quo (a)* presently, except a day be given expressly for the payment, or else it is nothing but communication. *Shep. Counsellor*, 249.

If a man agree for the price of wares, he cannot carry them away before he has paid for them, if he have not a day expressly given him to pay for them.

But the merchant shall retain the wares until he be paid for them; and if the other take them, the merchant may have an action of trespass, or an action of debt, for the money, at his choice *(b)*.

strongly against the covenantor, and most in advantage of the covenantee. 2. To be taken according to the intent of the parties. 3. To be construed *ut res magis valeat quam pereat.* 4. When no time is limited for its performance, it should be done within a reasonable time. Shep. Touch. 166.

(*a*) *An equivalent for value received.* But the contract, &c. must be legal; for transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a court of judicature; and any engagement for a reward to abstain from such crimes, is equally discountenanced, as it might effectually lead either to criminality or extortion. Shep. Touch. 132.

Every transaction, the object of which is the violation of a public or private duty, is also void; such are bribes for appointing to offices of trust, private engagements that an office shall be held in trust for a person by whose interest it was procured, agreements to stifle a prosecution for any crime of a public nature. See *Parsons* v. *Thompson*, 2 H. B. 322; *Garforth* v. *Fearon*, ib. 327; *Blanchford* v. *Preston*, 8 T. R. 89; *Collins* v. *Blantern*, 2 Wils. 347; 1 Fonb. Eq. 255, 5th edit.; 2 Evan's Pothier on Contracts, 2.

(*b*) *Manby* v. *Scott*, 1 Mod. 173; Dyer, 30, a. pl. 203.

If the bargain be that you shall give me ten pounds for my horse, and you give me one penny in earnest, which I accept, this is a perfect bargain *(c)*, you shall have the horse, by an action on the case, and I shall have the money by an action of debt. *(d)*

If I say the price of a cow is four pounds, and you say you will give me four pounds, and do not pay me presently, you cannot have her afterwards, except I will; for it is no contract. But if you begin directly to tell your money, if I sell her to another you shall have your action on the case against me.

If I buy a hundred loads of wood, to be taken in [88]

(c) Notwithstanding the earnest, the money must be paid upon the fetching away the goods, where no other time for payment is appointed. The earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money, is void. After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to go and request him; and then if he do not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. Per Lord Holt, *Langfort* v. *Tiler*, 1 Salk. 113; Vide *Peeram* v. *Palmer*, Gilb. evidence, 170. Sedgw. Edit.; 191 4th edit.

(d) If a man by word of mouth sell to me his horse, or any other thing, and I give him, or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all, or part of the money is paid in hand; or I give earnest money (although it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing, to alter the property thereof; and in the first case, I may have an action for the thing, and the seller for his money; in the second case, I may sue for, and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case, the seller may sue for his money. *Sheppard's Touchstone*, 224; *Sheppard's Counsellor*, 252.

such a wood, at the appointment of the vendor; if he upon request will not assign them unto me, I may take them, or I may sell them: But if a stranger cut down any part of the trees, I cannot take them; but I may supply my vendee with the residue, or have my action on the case.

If the bargain be, that I shall give you ten pounds for such a wood, if I like it upon the view thereof, this is a bargain at my pleasure, upon my view: And if the day be agreed upon, though I disagree before the day, if I agree at the day, the bargain is perfect, although afterwards I disagree. But I may not cut the wood before I have paid for it; if I do, an action of trespass will lie against me; and if you sell it to another, an action of trespass on the case, will lie against you. *Shep. Counsellor*, 257.

If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt, until he be delivered: yet the property of the horse, is by the bargain, in the bargainee or buyer: But if he presently tender me my money, and I refuse it, he may take the horse, or have an action of *detinue*. And if the horse die, in my stable, between the bargain and the delivery, I may have an action of
[89] debt, for my money, because by the bargain, the property was in the buyer. *Hob.* 41.

If a deed be made of goods and chattels, and delivered to the use of the donee, the property of the goods and chattels are in the donee presently; but before any entry or agreement, the donee may refuse them, if he will.

If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt, for the money; for the bargain was perfect by the delivery of the horse (*e*), & *coveat emptor* (*f*). Every contract imports in itself an assumption: For when one agrees to pay money, or deliver a thing upon consideration, he does, as it were, assume and promise to pay and deliver the same; and therefore, when one sells any goods to another, and

(*e*) But this applies exclusively to sales in market overt. 2 *Inst.* 719.
(*f*) *Let the purchaser beware.*

agrees to deliver them at a day to come, and the other in consideration thereof, agrees to pay so much money, on the delivery, or after, in this case, he may have an action of debt, or an action on the case, upon the assumption.

The duty to resign an action personal, may not be apportioned: As if I sell my horse, and another man's for ten pounds, who takes his horse again, I shall have all the money. *(g)*

If a man retain a servant for ten pounds *per annum*, and he depart within the year, he can have no wages: if it were to be paid at two feasts, and the man after the [90] first feast die, he shall have wages but for the first feast: Therefore men provide for it in their agreements.

By a sale made in a fair or market, the property is altered, so that the buyer know not of the former property, and do pay toll, and enter it; and those things as thereupon ought to be done, it must be on the market, and at the place where such things are usually sold; as plate at the goldsmith's stall, and not in his inner shop. *See* 2 *Bl. Com.* 250; 2 *Wooddeson's Lect.* 412. 431; 3 *Ibid.* 213; 2 *Hawk.* P. C. 250; 1 Hale, P. C. 542; 2 *Inst.* 714; *Perk.* § 93.

In an exchange of a horse for a horse, or such like, the bargain is good, without giving of a day, or delivery.

If a thing be promised by way of recompense, for a thing which is performed, it is rather an accord, than a contract; and upon an accord, there lies no action of account; but if he to whom the promise be made, had been put to expense by reason of the act which he has performed; then he shall have *account*, for the thing promised, though he that made the promise, has no profit thereby: As if a man say to another man, "You have cured such a poor man," or "You have made such a highway," &c.

The intent of the party, shall be taken according to [91] the law: As if a man retain a servant, and do not say one

(g) See further on contracts for the sale and purchase of goods and chattels, *Roberts on Frauds*, 164; 166, &c.; *Phillips Evid.* 465, *4th ed.*

year, or how long he shall serve him, it shall be taken for one year, according to the statute.

In all contracts, he that speaks obscurely or ambiguously *(h)*, is said to speak at his own peril; and such expressions are to be taken strongly against himself.

CHAP. XLIII.

OF LENDING AND RESTORING.

If money, corn, wine, or any other such thing which cannot be re-delivered, or occupied, be borrowed, and it perish, it is at the peril of the borrower.

But if a horse, or a cart, or such other things, as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through the default of him who borrows them, or he who made a promise at the time of delivery, to re-deliver them safe again. If they be [92] used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner; he who borrowed them shall be charged with them, in law and conscience. *(a)*

(h) There are two sorts of ambiguities of words, the one *ambiguitas patens*, and the other *latens*. *Patens* is that, which appears to be ambiguous upon the deed or instrument: *latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed, which occasions the ambiguity. *Bac. Maxims Reg.* 23, *Tr.* 99, *See further*, *T. Raymond*, 411; *Roberts on Frauds*, 15; 2 *Roberts on Wills*, 13. *Sugden's Vendors*, 115, 134, 5*th ed*; *Phillips on Evidence*, 566, 4*th ed*; 1 *Bac. Abr.* 342; *Pow. Dev.* 502, 513.

(a) If a man borrow a horse, for the purpose of coming to London, and go towards Bath, or having borrowed him for a week, keep him for a month, he becomes responsible, for any *accident* which may be-

If a man have goods to keep till a certain day, he shall be charged, or not charged after, as default is, or is not, in him.

But if he receive any thing, for keeping them safe, or make a promise, to re-deliver them, he shall be charged with all chances which may happen, because of his promise.

If one man find goods of another, and they be hurt or lost by the negligence of him who found them, he shall be liable to make them good to the owner.

If a common carrier go by ways which are dangerous on account of robbers, and will drive by night, or other unfit times, and be robbed *(b)*; or if he over-charge his horses; or drive so that his load fall into the water; or be otherwise hurt by his default; he shall be answerable for his negligence. *(c)*

And if a carrier would refuse to carry, unless a promise were made to him, that he shall not be charged with any such miscarriage, that promise were void.

fal the horse, in his journey to Bath, or after the expiration of the week. 2 *Ld. Raym.* 915; *Doct. and Stud.* 222, *ed.* 1815 *dial.* 2 *ch.* 38; *Jones on Bailments* 68; See Terms of the Law, *Bailment*, 35 *b*; 2 *Sheppard's Counsellor*, 266; *Hargr. n. Co. Litt.* 89; 2 *Fonbl. Eq.* 180 *i.*; 1 *Bac. Abr.* 368; *Shiells* v. *Blackburn*, 1 Hen. Blacks. 158.

(b) *Doct. and Stud.* 222, *dial.* 2 *ch.* 38. And in the rein of *Elizabeth* it was resolved, that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them. *Co. Litt.* 89 *a*; *Mo.* 462; 1 *Roll. Abr.* 2. *Woodliefe* and *Curties*. The modern rule concerning a common carrier is, that "nothing will excuse him, except the act of God, or of the king's enemies." *Bull. Ni. Pr.* 70, 71. 1. *Stra.* 128; If robbery excused a carrier, confederacies would be formed between carriers and desperate villains with little or no chance of detection, to the infinite injury of commerce and extreme inconvenience of society. *Ld. Raym.* 917; 12 *Mod.* 487; *Jones*, 104.

(c) In an action against a carrier, it was holden to be no excuse, "that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed," *Dale* v. *Hall*, 1 Wils. part 1, 281; but the true reason of this decision is not menstoned by the reporter; it was in fact, *at least ordinary* negligence, to let a rat do such mischief in the vessel. Jones, 105.

Every innholder is bound by the law to keep in safety *bona & catalla (d)*, of his guest, so long as they are within the inn, though the guest did not deliver them unto him, nor acquaint him with them. *(e)*

[93] He shall not be charged, if the servant or companion of the guest, embezzle them; or if the guest leave them in the outward court.

The ostler shall not answer for the horse which is put to pasture *(f)*, at the request of the guest; but if he do it without the guest's orders, he shall. *(g)*

If any man offer to take away my goods, I may lay my hands upon him, and rather beat him than suffer him to take or carry them away.

[For a very lucid view of the LAW OF BAILMENTS, see Sir *William Jones's* celebrated treatise on that subject.]

[*d*] *The goods and chattels.*

[*e*] *Vide* Jones, 91, 94, 95; 12 *Mod.* 487; 2 *Cro.* 189; *Mo.* 78; *Dyer*, 158 *b*; 1 *And.* 29; 1 *Bl. Com.* 430.

(*f*) Even if he turn out the horse, by order of the owner, and receive pay for his grass and care, he is chargeable for ordinary negligence, as a bailee for hire, though not as innkeeper; for if a man, to whom horses are bailed for agistment, *leave open the gates of his field*, in consequence of which neglect they stray and are *stolen*, the owner may have an action against him. *Mo.* 543; 1 *Roll. Abr.* 4; *Jones*, 92.

(*g*) *Cayle's* case, 8 Co. 32. See also Countess of *Salop's* case, 5 Co. 13 b. So also if a sheperd to whom sheep are intrusted, by negligence suffers them to be drowned, or otherwise to perish, an action upon the case lies. *Wing. Max.* 670, *pl.* 3.

CHAP. XLIV.

How far other men's Contracts and Misdemeanors bind us.

A Man shall be bound by many trespasses of his wife, but not to sustain corporeal punishment for it.

For murder, felony, battery, trespass, borrowing or receiving money in his master's name, by a servant, the master shall be not charged, unless it be done by his command, or came to his use by his assent.

If I command one to do a trespass, I shall be a trespasser *(a)*, or even if do but consent. There is no accessary in trespass. *(b)*

We shall be charged if any of our family lay or cast any thing into the highway, to the nuisance of his Majesty's liege people. [94]

Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbour, though he knew not that they were there; and for his dogs, bears, &c. if they hurt the goods or chattels of any other, because he is to govern them.

A man shall not be charged by the contract of his wife, or his servant, if the thing come to his use, having no notice of it: but if he authorise them to buy generally, he shall be charged though they come not to his use, or he had no notice thereof. *(c)*

If a wife or servant accustomed to buy or sell, if he sell his master's horse or exchange his ox for wheat which

(a) This must be understood to extend only to servants and others over whom I may have a lawful authority; and in case of a servant he is not excused, for he is only to obey his master in matters that are honest and lawful. 1 *Bl. Com.* 430.

(b) 20 *Vin. Abr.* 461, R. 2; *Ibid* 461, *pl.* 4 *and* 5; 4 *Bl. Com.* 36.

(c) 4 Bac. Abr. 585, *Master and Servant*, K.

comes to his master's use, his master cannot have an action of trespass for it; but he shall be charged for the corn, and the other need not to shew that he had warrant to buy for him.

If a man servant who keeps his shop, or who is accustomed to sell for him, shall give away his goods, he shall have trespass against the donee.

[95] But if I deliver my goods to another to keep to my use, and he give them away, I shall not; for the donee had no notice whose goods they were, as in the case of the servant.

If a man make another his general receiver, who receives money, and makes an acquittance, and pays not his master, yet that payment discharges the debtor.

If a servant keep his master's fire negligently, an action lies against the master: Otherwise, if he carry it negligently in the street. *See Stat.* 6 *Anne c.* 3.

If I command my servant to distrain, and he ride on the horse taken for the distress, he shall be punished, not I.

If a man command his servant to sell a thing which is defective, generally to whom he can sell it, deceit lies not against him: Otherwise if he bid him sell it to such a man, it does.

A contract or a promise made to the wife is good, when the husband agrees, so it is to a servant; and it shall be said to be made to the husband and master himself. *(d)*

If a man takes a wife who is in debt, he shall be charged with her debts during her life; if she die, he shall be discharged. *(e)*

[*d*] See further, 4 Bac. Abr. 582. *Master and Servant*, I, K.

[*e*] 1 *Roll. Abr.* 351, G, *pl.* 2; 4 *Vin. Abr.* 142. But he will be liable as her administrator to the extent of her assets. *Heard* v. *Stanford*, Cas Temp. Talb. 173; 1 *P. Wms.* 465, 468.

CHAP. XLV. [96]

WILLS AND TESTAMENTS. *(a)*

HAVING hitherto treated of such contracts as take effect in the life-time of the parties, with their differences, it is now necessary to treat of instruments which take effect after their deaths, that those things which men have preserved with care, and procured with pains in their life, might be left to their posterity in peace and quietness after their death: Of which sort are last wills and testaments.

There are Two Sorts of Wills; Written and Nuncupative.

A nuncupative testament is when the testator by word only, without writing, declares his will before a sufficient number of (*b*) witnesses concerning his chattels only; for lands pass not but by writing. It may for the better continuance after the making be put in writing, and proved; but it is still a testament nucupative.

A written testament is that, which at the very time of the making thereof is put in writing, by which kind of

(*a*) *Testamentum*, or last will, is thus described by Modestinus:— *Voluntatis nostrae justa sententia de eo quod quis post mortem suam fieri velit.* D. 28. 1. 1; 2 Bl. Com. 499. One great and principal use of a good definition is this, that it may be considered as a whole doctrine in epitome: and thus, I am persuaded, all the necessary knowledge upon the subject of *tetamenti factio* would turn up, by carefully surveying the terms contained in the definition before us. Taylor's Civil Law, 531, 2d edit.

(*b*) [The *principles* of the English statutes of 29 Car. 2. c. 3. s. 19, and 4 & 5 *Anne*, c. 16. in relation to nuncupative wills, have been adopted by nearly all the states in the union, varying only in a few circumstances. The regulations of the several states will be found in the 2d volume of Anthon's edition of *Sheppard's Touchstone*, and in the 3rd and 4th volumes of Griffith's Law Register of the United States. For the present law of Virginia, See 1 Rev. Code of 1819, p. 377, §7, 8.]

[97] testament in writing only, lands and tenements pass, and not by word of mouth only.

Two things are required to the perfection of a will by which lands pass, viz. first, writing, which is the beginning (*c*) ; secondly, the death of the devisor, which is the finishing.

In a will of goods there must be an executor named ; it is otherwise of lands.

A man may make one executor or more simply, or conditionally for a time, or for parcel of his chattels.

If no executor be named, then it still retains the name of the last will, and shall be annexed to the letters of administration on account of the legacies.

Gavelkind lands may be devised by custom.

Lands holden in socage tenure are all devisable in writing, but knights service two parts in three. (*d*)

Fear, fraud, and flattery, are three unfit things to be at the making of a will.

A woman may make a will of the goods of her husband by his consent and license: By word is sufficient, and of the goods she has as executor without his consent ; but she cannot give them unto him.

[98] A boy after his age of fourteen, and a maid after her age of twelve, may make a will of their goods and chattels by the civil law (*e*). [But by the laws of Virginia, none under eighteen, 1 Rev. Code of 1819, p. 377, §6.]

The will of the testator shall be always observed, if it be not impossible, or greatly contrary to the law.

A devisor is intended *inops concilii (f)*, and the law

(*c*) [For the origin of conveying lands by will, and the several English statutes regulating such conveyances, See 2 Bl. Com. 373 *et seq* :—and for a view of the laws of the several states, on the same subject, See 2 *Shep. Touch. Anthons's edit.* ; and *Griffith's Law Register*, *vol.* 3 and 4. For the existing laws of Virginia, see 1 Rev. Code of 1819, p. 375, as amended by act of 1822, ch. 27, §2, which requires that the witnesses should *subscribe their names*, in the presence of the testator.]

(*d*) These distinctions were abolished by stat. 29. Car. 2. c. 14.

(*e*) *Hargr. n. Co. Litt.* 189 *b.* [6]. (*f*) *Wanting counsel.*

shall be his counsel; and according to his intent appearing in his will, shall supply the defect of his words.

A prerogative will is five pounds in another diocese.

A man cannot traverse the probate of a testament, or letters of administration directly, but he may say against the testament, that the testator never made the party his executor *(g)*.

CHAP. XLVI.

DEVISES.

A DEVISE ought to be good and effectual at the time of the death of the devisor.

The devisee *(a)* cannot enter into a term for years, or take a chattel personal but by the delivery of the executor.

But he may sue for it in *Court Christian (b)*.

(g) But see Toll. Ex. 76. [The power af contesting the validity of a will is expressly provided for, in Virginia, even after probate, by bill in chancery; and an issue *devisavit vel non*, is a matter of course. See 1 Rev. Code of 1819, p. 378 §13]

(a) When *chattels*, either real or personal, are given by will, it is a *bequest; devise* is exclusively applied to gifts by will of estates of *freehold* or *inheritance*. So the person to whom the chattels are given by will is, in strict propriety, called a *legatee*, and not a *devisee*.

(b) The Ecclesiastical Court.—[And such is the constant course in England.] Cases have occurred in which courts of common law have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumpsit*, or undertaking by the executor to pay them. But it seems to be the opinion of modern judges, that this jurisdiction extends to cases of *specific* legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. *Atkins* v. *Hill*, Cowp. 284; *Doe*, dem. Lord *Say* and *Sele* v. *Grey*, 3 East. Rep. 120. So it seems

[99] Into freehold or inheritance he may enter.

Devisees are purchasers: So if a lease for years be willed to a man and his heirs, the heir shall have it; for heir is a name of purchase here.

A reversion of lands or tenements will pass by the name of lands and tenements in a devise.

If a man devise all his lands and tenements, a lease for years does not pass where he has lands in fee, and also a lease of land there, otherwise it will *(c)*.

to be the better opinion, that when the legacy is not specific, but merely a gift out of *general* assets, and particularly when a *married woman* is the legatee, that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit of doing. *Deeks* v. *Strutt*, 5 T. R. 690; 2 Rop. Leg. 595. Thus legacies bequeathed to married women, ought, in general, to be paid to their husbands; but in cases where the husband has made no provision for his wife, the executors may withold payment of the legacy until he consent to make a suitable provision, as the Court of Chancery, upon a bill filed by the husband for the legacy would refuse to make such an order, unless the husband consented to a reasonable settlement on the wife, out of the legacy; *Brown* v. *Elton*, 3 P.Wms.202. 2 Eq.Cas Abr. 241, pl. 29, or unless the legacy be under £200, or £10, in annual payment. *March* v. *Head*, 3 Atk. 721; *Beames' order in Chancery*,464; 1 Madd Ch. 482 2d edit.; and it seems, that though the wife elope from her husband, and cohabit with another man, if she be unprovided for, the court will not allow her husband to take her property without making a provision for her. *Bull* v. *Montgomery*, 4 Bro. C. C. 339. 345 *See* also *Carr* v. *Eastabrooke*, 4 Ves. 146. But if the wife consent in court, or if abroad, before proper commissioners, for the husband to receive her legacy, the court will decree it accordingly, without requiring any settlement. *Willats* v. *Cay*, 2 Atk. 67; *Parsons* v. *Dunne*, 2 Ves. 60; *Ellis* v. *Atkinson*, 3 Bro. C. C. 565. But when the feme-legatee is the subject of a *foreign* state, by the law of which the husband would be entitled to receive the whole of his wife's property, without making any provision for her, the Court of Chancery will dispense with the wife's consent in such cases, and decree the legacy to her husband. *Campbell* v. *French*, 3 Ves. 323; 1 Rop. Leg. 372; 1 Fonb. Eq. 98. n.—*See Francis Maxims. p.* 3.

(c) *Rose* v. *Bartlett*, Cro. Car. 292. There has been much fluctuation of opinion on the subject. See *Davis* v. *Gibbs*, 3 P. Wms. 26; *Addis* v. *Clement*, 2 P. Wms. 456; *Lowther* v. *Cavendish*, Ambl. 356; 1 Eden, 99. 110. 113; *Turner* v. *Husler*, 1 Bro. C. C. 78; *Knotsford* v.

If a man devise all his goods, a rent-charge which he had for years will pass, and all other his personal chattels.

And if a man give all his moveables to one, he shall have all his horses, cattle, pans, and personal chattels; and if he gives all his immoveables to another, he shall have all his corn growing, and fruit on his trees, and the chattels real. *(d)*

A man may devise lands or goods to an infant in the mother's womb *(e)*, or goods to the churchwardens of *D.*

Gardiner, 2 Atk. 450; *Pistol* v. *Riccardson*, 1 H. Blacks. 26, n; 2 P. Wms. 459, n; *Lane* v. *Stanhope*, 6 Term Rep. 345; *Thompson* v. *Lady Lawley*, 2 Bos. and Pull. 303; 5 *Ves.* 476; 6 *Cru. Dig.* 232, 2d *edit.* 1 *Rob on Wills*, 440; 2 *Rop. Leg.* 360. Whenever it can be collected from the words of the will, that the testator's intention was that both freehold and leasehold should pass, the will has that effect.

[*d*] *Godolphin's Orphan's Legacy*, 392, s. 6, 7. See *Perk. s.* 525.

[*e*] *Scatterwood* v. *Edge*, 1 Salk. 229. It was formerly disputed, whether a devise to an infant in *ventre sa mere* was good or not; some held that it was not, while others contended it was; but all agreed that a devise to an infant when he should be born was good. A devise to such infant necessarily implies a future disposition, to take effect at its birth, as much as if the words "when he shall be born" were added; for we cannot imagine an intention, that the child should take the estate before it is born. But at this day it is clearly agreed that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. So a limitation to the child of which the wife was supposed *ensient* was a good contingent remainder [the wife taking a preceding estate for life] to a supposed child in *ventre sa mere;* and if there had been no devise to the wife for life, the devise to the child for life, being *in futuro* [by which must be meant being in its own nature future], would have been a good executory devise. 1 *Freem.* 244, 293; *Fearne's Rem.* 533–4–5, *Butler's edit.*: 426, 3d *edit.* An infant in *ventre sa mere* may take a share of real estate under a devise "to the use and behoof of all and every such child or children of my said brother as shall be living at the time of his decease." *Doe* v. *Clarke*, 2 Hen. Bl. 400; *Clarke* v. *Blake*, 2 Bro. C. C. 321; 2 Ves jun. 673. And it is now settled, that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for its own benefit. *Lancashire* v. *Lancashire*, 5 T. R. 49; *Watk. Des.* 142. A child *en ventre sa mere* may be vouched in a recovery, though for the purpose of answering over in value. *Co. Litt.* 390 *a.* It may be the subject of murder, 3 *Inst.* 50, 51. It may take under the statute of distributions,

There is great diversity where the property is devised, and when the occupation is devised; a man may devise, that a man shall have the occupation of his plate, or other
[100] chattels during his life, or for years, and if he die within the term, that it shall remain to *M. A.* and it is good; for the first has but the occupation, and the other after him shall have the property.

But if a chattel be given to one for life, the remainder to another, the remainder is void. *See ch.* 12 *n.* (*c*)

For a grant or devise of a chattel for an hour is good

as living at the intestate's death. *Edwards* v. *Freeman*, 2 P. Wms. 446; *Wallis* v. *Hodson*, 2 Atk. 114. It may be entitled to the benefit of a charge for raising portions for children living at the death of the testator. *Hale* v. *Hale*, Pre. Ch. 50. It may obtain an injunction to stay the commission of waste to its disadvantage. *Musgrave* v. *Parry*, 2 Vern. 710. It will prevent a remainder from taking effect which depended upon the death of its father, without leaving issue. *Burdet* v. *Hopegood*, 1 P. Wms. 487. A limitation to it for life, with remainder to its first and other sons successively in tail, will, as it seems, be a good limitation, which could not be unless a posthumous child is considered in law a child *in esse*, *Long* v. *Blackall*, 3 Ves. 486; 7 T. R. 700 *S. C.* and Per Buller, J. *Thelluson* v. *Woodford*, 4 Ves. 322. Upon the whole, "posthumous children are entitled to all the privileges and advantages of other persons." 1 *Rop. Leg.* 89; 2 *Fonb. Eq.* 349. ☞ Lord Kenyon's opinion, to which he seems to have adhered so firmly in *Pierson* v. *Garnett*, 2 Bro C. C. 47; *Cooper* v. *Forbes*, 1bid. 63; *Freemantle* v. *Freemantle*, 1 Cox, 248, is now overruled.

As to illegitimate children, it seems settled, that if an illegitimate child *en ventre sa mere*, be so described as to ascertain the object intended to be pointed out, it may take under that description, as in the case of a bequest to the natural child with which a woman is now *ensient*, *without reference to any person as the father;* nor would such a bequest be invalidated, by the testator giving as a reason for the legacy, that he believed he was the father of such child. *Wilkinson* v. *Adams*, 1 Ves. & B. 423; *Gordon* v. *Gordon*, 1 Meriv. 141. But a bequest to "such child as *A.* may happen to be *ensient* with, *by me*," has been held void. *Earle* v. *Wilson*, 17 Ves. 528. Eden's note, 2 Bro. C. C. 321. So a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect that such should be. *Fearne's Rem.* 249, *Butler's edit.;* 176, 3*d edit.* See further, *Hargr. n. Co. Litt.* 3 b. 1; 3 *Bac. Abr.* 378, *Grants, C.;* 2 *Roll. Abr.* 43, 44; 4 *Vin. Abr.* 233. *Bastard*, P.; 14 *Vin. Abr.* 37; 1 *Fonb. Eq.* 349.

for ever, and the devisee may dispose of it; but if he do not, the other shall have it. (*f*)

A man may devise his lands he holds in lease, but not his lease under this condition; provided that if the lessee die within the term, then the lessor shall have it.

If a man will his goods to his wife, and that after her decease his son and heir shall have the house wherein they are; she shall have the house for term of her life, yet it is not devised unto her by express words. But it appears that his intent was so by the words. (*g*)

If a man will his lands to his wife till his son come to the age of twenty-one years, and the woman take another husband and die, the husband shall have the interest. (*h*)

[*f*] In equity, limitations over of chattels personal, after a bequest to one for life, are good as executory bequests.

The ancient distinction between the bequest of the use of a personal thing, and the thing itself to any one for life, &c. has been completely settled, in the constructive operation of such a limited gift, to entitle the restricted legatee only to the use of the thing for the period expressed.

In case of a bequest of goods to one for life, with remainder over, the legatee for life was formerly compellable in equity to give security for the goods being forthcoming at his decease: but the latter practice is for an inventory to be signed by the legatee for life, &c. to be deposited with the Master for the benefit of all the parties: which Lord Thurlow observed was more equal justice; as there ought to be danger in order to require security. *Foley* v. *Burnell*, 1 Bro. C. C. 279; *Slanning* v. *Style*, 3 P. Wms. 339; *Hyde* v. *Parratt*, 1 P. Wms 6: and notes; *Fearne's Rem.* 404, 406, 407, *Butler's edit.*; 30, 34, 35. *Powell's edit.* 302, 306, 3*d edit.*

(*g*) Bro. Ab. *Devise*, pl. 52; *Vaugh* 263. A good commentary on all the cases. *Horton* v. *Horton*, Cro. Jac. 75. For by the express words of the will the heir was not to take it till after the death of the wife; therefore if she did not take it, no one else could. So if a man having a wife and two daughters, heirs at law, devise lands to one of the daughters after the wife's death; this is a devise to the wife for life by *implication*, though the daughter is but one of the co-heirs. *Hutton* v. *Simpson*, 2 Vern. 723.

(*h*) *See Co. Litt.* 46 *b.* 351 *a*; *Boraston's* case; 3 *Co.* 19; *Palm.* 132; 1 *Eq. Cas. Abr.* 188, *pl.* 8; *Fearne's Rem. Butl. edit.* 242, 401; 3*d edit.* 168.

[101] By a devise, a man may have the fee-simple without the express word "*heirs*:" As if lands be willed to a man for ever, or to have and to hold to him and to his assigns, &c.

By will, lands may be entailed without the word "*body*:" And if lands be given to a man and his heirs male, it makes an estate tail.

If a man will that his executors shall sell his lands the inheritance descends to the heir (*i*); yet the executors may enter and enfeoff the vendee. (*k*)

But if lands be given to the executor to sell, and they receive the profits thereof to their own use, and do not sell the same in reasonable time, the heir may enter. *Litt. s.* 383.

One executor may sell if the others will not. (*l*)

If lands be recovered against tenant for life, or for years, by an action of waste or superior title, he cannot gather his corn. *Perk. s.* 515; *Co. Litt.* 55 *b.*

If the cognisee have sown the lands, and the cognisor bring a *scire*, the cognisee shall have the corn sown. (*m*)

If a man devise *omnia bona & catalla* (*n*), hawks nor hounds do not pass, nor the deer in the park, nor the fish in the ponds.

(*i*) *Co. Litt.* 236 *a.*

(*k*) *Vide Litt. s.* 169; *Hargr. n. Co. Litt.* 113 a. 2; 1 *Roll. Abr.* 329, 330; 3 *Vin. Abr.* 419, 420; 4 *Bac. Abr.* 281, *Devise* E.; 6 *Cru. Dig.* 456, 2*d ed*; *Sug. Pow.* 102. 2*d ed. Pow Dev.* 302; *Toll. Executors*, 363, 413.

(*l*) By 21 *Hen.* 8 cap. 4. *See Co. Litt.* 113 *a* 181 *b*; *Rev.* 1 *Code of* 1819, *pa.* 388 § 52

(*m*) *Co. Litt.* 55 *b*; *Perk.* s. 517. See further on the subject of *Emblements*, Perk. s. 512 to 524; Vin. Abr. *Emblements* per tot. and *Executor* U. Com. Dig. *Biens*, B. C. and G. Bac. Abr. *Executors* and *Administrators*, H. 3. *Gilb. Evidence*, 242, 4th edit; 209, *Sedgw. edit*; *Toll. Ex.* 205; *Hargr. notes*, *Co. Litt.* 55. *a*, *b*.

(*n*) *All his goods and chattels.*

CHAP. XLVII.

EXECUTORS. [102]

An executor is he who is named and appointed by the testator to be his successor in his stead to enter, and to have his goods and chattels, to bring actions against his debtors, and pay his legacies so far as his goods and chattels will extend.

Where two executors are made, and one proves the will, and the other refuses, notwithstanding he who refuses may administer at his pleasure, and the other must name him in every action for every thing due to the testator, and his release shall be a good bar. If he survive he may administer, and not the executor of him who died: But otherwise if all had refused. (*a*)

If one prove the will in the name of both, he who does not administer shall not be charged.

If the executor do any one act which is proper to an executor, as to receive the testator's debts, or to give acquittance for the same, &c. he cannot refuse.

But other acts of charity or humanity he may do, as to dispose of the testator's goods about the funeral, to feed his cattle lest they perish, or to keep his goods lest they be [103] stolen: These things may every one do without danger.

When executors bring an action, it shall be in all their names, as well of them who refuse, as of the others.

But an action must be brought against him only who administers; and he who first comes shall first answer.

(*a*) *Vide Off. Ex.* 42; 3 *Bac. Abr.* 43, *Executor* E., 9; *Dyer*, 160, *b.* 42; *Pawlet* v. *Freak*, Hard. 111, pl. 2; *House* v. Lord *Petre*, 1 Salk. 311. After one has proved, the other cannot renounce till after his death; but if he then renounce, the testator is dead intestate. Com. Dig. *Administrator* B. 1.; 11 *Vin. Abr.* 68, *pl.* 21, 31.

An executor of an executor, is executor to the first testator (*b*), and shall have an action of debt, account, &c. or of trespass, as of the goods of the first testator carried away, an execution of statutes and recognizances, &c. Stat. 25 *Ed.* 5; 1 *Rev. Code of* 1819, *pa.* 390, § 64. 65.

The title and interest of an executor is by the testament, and not by the probate; and without shewing the probate they may release the debts: But the justices will not allow them to sue actions. (*c*)

The executors shall have the wardship of the body and lands of the ward in knights service, but not in socage, and leases for years, and rent-charges for years, statutes, recognizances, bonds, lands in execution, corn upon the ground, gold, silver, plate, jewels, money, debts, cattle, and all other [104] goods and chattels of the testator, if they be not de-

(*b*) 2 Bla. Com. 506; Toll. Ex. 243; 3 Bac. Abr. 19. Executors (B) 2, 1, pl. 2; Com. Dig. Administration (G). But this is to be understood, when the first executor proves the will, *Palm.* 156; for if the executor die after administering, and before probate, his executor cannot prove the will of the first testator; because he is not named executor to him in the will; and no one can prove the will, but who is named executor in the will; *Wankford* v. *Wankford*, 1 Salk. 309; and administration of the goods of the first testator *cum testamento annexo*, must be granted to the executor of the executor, if the residue of the goods of the first testator were bequeathed by his last will to the first executor; or, otherwise to the residuary legatee, if any, or to the next of kin of the first testator. Roll. Abr. 907 pl. 10; *Isted* v. *Stanley*, Dyer, 372 a, (8); *Day* v *Chapfeild*, 1 Vern. 200; 11 Vin. Abr. 67, pl. 10, 20, 27; 3 Bac. Abr. 19, Executors (B) 2 1 pl. 3.

(*c*) Shep. Touch. 474; Godolp. Orphan's Legacy, 144; Off. Ex. *b.* 4. An executor may assent to a legacy, assign a term, or release an action as well as a debt, before probate, *Middleton's* case, 5 Co. 28 a; *Hudson* v. *Hudson*, 1 Atk. 461; and in short, is a complete executor, before probate, for all purposes, excepting that he cannot declare in an action before probate; for without producing his letters tetamentary, he cannot assert his right in court; but he may *commence* an action at law, *Bacon's Law Tracts* 160; 1 *Salk.* 303; 4 *Burn's Eccl. Law*, 246. 6th ed.; or file a bill in equity before probate, *Humphreys* v. *Humphreys*, 3 P. Wms. 351; and when produced, it shall have relation to the time of suing out the writ, or filing the bill; and on a bill in equity, it is sufficient, if the probate be obtained at any time before the hearing. 3 Bac. Abr. 53; Toll. Ex. 46; Com. Dig. *Administration*, B. 9.

vised, and may devise them: But if the executor give by will *omnia bona & catalla sua (d)*, the goods of the testator pass not, neither shall they be forfeited by the executor.

An executor is chargeable for all duties of the testator which are certain, so far as he shall have assets: But not for trespass, nor for receipt of rents, nor for occupation of lands, as bailiff, or guardian in socage, &c. for this is not any duty certain. If the executor waste the goods of the testator, he shall pay for them out of his own.

An executor shall be charged only with such goods as come to his hands; but if a stranger take them out of his possession, they are assets in his hands. *See Shep. Touch.* 490.

If an executor take another man's goods amongst the goods of the testator, he shall be excused for the taking in an action of trespass.

Duties by matter of record shall be satisfied before duties by specialty; and duties by specialty before charges on contract; and legacies after other duties. (*e*)

An executor may pay a debt or credit of the same kind, or degree pending the writ, before notice of the action, but not after notice or issue joined. *See Toll. Ex.* 289.

An executor may pay debts with his own money, and retain so much of the testator's goods, but not lands appointed to be sold. [105]

Any of these words, *debere*, *solvere*, *recipere (f)*, borrowed, or any word which will prove a man a debtor, or to have the money, if it be by writing, will charge the executor or administrator, but not the heir, if he be not named.

(*d*) *All his goods and chattels.*

(*e*) Godolph. Orph. Leg. 215; Toll. Ex. 258; 3 Bac. Abr. 79. *Executor*, L 2.—[*Debts* of every kind as well by *simple contract* as by record and specialty, must be paid before *legacies*. Went. c. 12.]

(*f*) *To owe, to pay, to receive.*

CHAP. XLVIII.

ADMINISTRATORS.

An administrator is he to whom the ordinary of the place, where the intestate dwelt, commits the intestate's goods, chattels, credits, and rights.

For wheresover a man dies intestate, either because he was so negligent that he made no testament, or made such an executor as refused to prove it, or otherwise is of no force; the ordinary may commit the administration of his goods to the widow or next of kin making request, or to both, which he pleases, and he may revoke it again at his pleasure.

The ordinary may assign also a tutor to the intestate's children, to his sons until fourteen, to his daughters until twelve years; but so that it may be not a prejudice to him who is the guardian. And after those years he or she may respectively choose their own curators, and the guardian may confirm them, if there be no good order taken by their father's will; and if such a tutor die, the infant cannot have an action of account against his executor. *See Harg. n. Co. Litt.* 88 *b*; *Vaugh.* 184.

[106]

The power and charge of an administrator is equal in every point to the power and charge of an executor. *(a)*

(a) Though some are of opinion that one of several administrators may without the others sell goods, release debts, plead to actions, and the like, in the same manner as executors may, Goldsb. 141; 3 Bac. Abr. 30; 5 Bac. Abr. 700; Toll. Ex. 408; yet this is doubted by others because they all have but one entire *authority*, wherein they ought to join in what they do. Godolphin's Orphan's Legacy, 134, 4th ed.; Shep. Touch. 485; *Hudson* v. *Hudson*, 1 Atk. 460; 11 Vin. Abr. 73. 2 Fonb. Eq. 391, n. 5th ed.; Bacon's Law Tracts, 162, ed 1737; Works, 4th vol. 83; Supp. Off. Executor, Wilson's edition, 124; 4 Burn's Ecclesiastical Law, 316, 6th edition; Wood's Inst. 325, 10th edition. It seems to be the better opi-

A man may have an action on the case against the executor or administrator, upon the assumption of the testator, upon good consideration; or debt for labourers' wages, by the statute.

And if a man make an infant his executor, the ordinary may commit the execution of the will to the tutor of the child, to the child's behoof, until he be of the age of seventeen years, and if it be granted for longer time, it is void.

An administrator *durante minoritate* (*b*) can do nothing to the prejudice of the infant, he cannot sell any of the goods of the deceased, unless it be upon necessity; as for the payment of debts, or that they would perish; nor let a lease for a longer time than whilst he is executor. *See* 3 *Bac. Abr.* 13, *Executors.* (B)

An infant upon the true payment of a debt due to the testator, may make an acquittance, and it shall [107] be good: for a child may better his estate, but not make it worse.

nion, that, a title to a leasehold estate, cannot be safely accepted from one or more of several administrators, when the others have not united in some manner in the sale or conveyance or subsequently assented.

(b) During minority.

CHAP. XLIX.

HEIR.

If a man die seised of any lands, and do not dispose of them by his will, they descend to his heir as aforesaid. *(a)*

And he shall have not only the glass and wainscot *(b)*, but any other of such like things affixed to the freehold or ground; as tables, dormants *(c)*, furnaces, vats in the brewhouse or dyehouse *(d)*; and the box or chest where-

(*a*) A bastard, by the general consent of almost all civilized nations, is considered, as it were, the first of his family. For which reason he cannot by law be heir to his father; for he has none, at least the law knows of none. D. 1. 5. 23. [He is *aullius filius*, and therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. 1 *Bl. Com.* 458.]

And upon the same principle, having no legal relations, no body can claim a legal succession to him, except the heirs of his body, who sprang from him, and without whom he has no relations at all. Taylor's Civil Law, 273.

[But, by the laws of Virginia, bastards shall be capable of inheriting or of transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten of such mother. 1 Rev. Code of 1819, p. 357 §18.]

(*b*) *Herlakenden's* case, 4 Co. 63 b. 64 a; Swinb. pt. 6. s. 7. 2 Pow. ed. 758.

(*c*) *i. e.* Bedsteads or couches, fastened to the ceiling with ropes, or nailed. *Sed vide contra*, 3 Atk. 478, as to landlord and tenant.

(*d*) 1 Powell's Swinb. 256; 3 Bac. Abr. 63. *Executors*, H 3; Off. Ex. 60. 62; Godol. Orp. Leg. 127. The law seems now to be held not so strictly as formerly, and if these things can be taken away, without prejudice to the fabric of the house, or soil of the freehold, it seems, that the executor shall have them; as tables, although fastened to the floor; furnaces if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise: 3 *Gwill. Bac. Abr.* 64; *Toll. Ex.* 198; and hangings, tapestry, and iron backs to chimnies, belonging to the executor, *Harvey* v. *Harvey*, 2 Stra. 1141; and Ld. Ch. Baron Comyns, at the Assizes at Worcester, upon an action of trover, brought by the executor against the heir, was of opinion, that a *cider mill* which is let

in the evidences are *(e)*; the hawks and the hounds; the

very deep into the ground, and is certainly fixed to the freehold, was personal estate, and he directed the jury to find for the executor. *Ex relatione* Mr. Wilbraham, 3 Atk. 14. 16. So Lord Hardwicke decided that a fire engine, set up for the benefit of a colliery, by a tenant for life, was, as between his executor and the remainder-man, to be considered as part of his personal estate, and should go to the executor, for the increase of assets *in favor of creditors.* And his Lordship observed, that, so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold; but, since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done. Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire engines, and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, *landlords* will not be allowed to retain them. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man: but even in these cases, it does admit the consideration of public conveniency for determining the question. I think, he added, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. *Lawton* v. *Lawton*, 3 Atk. 13. So if tenant in tail, erect a fire engine to work a colliery, it will be considered as part of his personal estate, and not go with the estate to the remainder-man, but this does not hold between the heir and executor, Lord *Dudley* v. Lord *Warde*, Ambl. 113. See also Bul. N. P. 34.

(e) Off. Ex. 64; *Godol. Orp. Leg.* 127; 4 *Burn's Eccl. Law.* 304, 6*th edit.* But those deeds and writings which relate to terms for years, goods, chattels, or debts, belong to the executor, 3 Bac. Abr. 65. Toll. Ex. 192. So where a bill was filed in Chancery for an antique horn, with this old inscription, *Pecote this Horne to hold Huy thy Land*, and which had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their land by, and praying that it might be restored; the Lord Keeper was of opinion, that if the land were held by the tenure of a *horn* or *cornage*, (Co. Litt. 107 *a.*) the heir would be well entitled to this monument of antiquity at Law. *Pusey* v. *Pusey*, 1 Vern. 273.

doves in the dove-house; the fish in the pond; and the deer in the park *(f)*, and such like.

He shall be charged by specialty for the debts of his ancestor, so long as he has assets, if the executor or administrator have not sufficient. *(g)*

No law or statute charges the heir for the wrong or trespass of his father, but by express words.

[108] WIDOW.

The widow shall have all her apparel, her bed, her copher, her chains, borders, and jewels *(h)*, by the honourable custom of the realm, except her husband unkindly give any of them away *(i)*: or be so in debt, that it can-

(f) And rabbits in a warren; if the ancestor had the inheritance, Godol. Orp. Leg. 126, or but for life, in the pond, warren, park, or dove-house: but if the deceased were but a termor, they go to the executor, as necessary chattels, following their principal. Off. Ex. 53; Hargr. *n.* Co. Litt. 8 *a.* (10.)

[*g*] But the body of the heir is protected, and the plaintiff shall only have a *special elegit* of lands descended in fee-simple, *Lusan's* case, 1 Dyer, 81 a. pl. 62. or *pur autre vie*, by the statute of frauds. And if the heir pay his ancestor's debts to the value of the land descended, he shall hold the land discharged: because otherwise he might be chargeable *ad infinitum*, *Buckley* v. *Nightengale*, 1 Stra. 665; and the heir must be expressly named, in a writing under hand and seal, otherwise he is not chageable. *Gifford* v. *Manley*, Cas. Temp. Talb. 108. 3 Bac. Abr. 458. *Heir*, &c. [F.]

[*h*] Suitable to her degree, 2 Bla. Com. 436; Com. Dig. *Baron and Feme*, [F. 3.] 2 Pow. Swin. 760. pt. 6. s. 7; Godolph. Orph. Leg. 130; 3 Bac. Abr. 66; Toll. Ex. 229.

[*i*] Whatever jewels a wife wears for the ornament of her person, the husband may alien in his life time. 3 Atk. 394; but he cannot bequeath them, by his will, any more than an ancestor can heir looms from the heir. *Tipping* v. *Tipping*, 1 P. Wms. 730. So if a husband pledge his wife's paraphernalia, and die, leaving a sufficient estate to redeem the pledge, and pay all his debts, she will be entitled to have it redeemed out of the husband's personal estate; although a specific legatee would be entitled in equity to have it disincumbered, or to receive an equivalent out of the personal estate of the testator *Graham* v. *Londonderry*, 3 Atk. 395; 3 Bac. Abr. 66. And as a specific or any other legatee shall, in equity, stand in the place of a bond

not be paid without her bed (*k*), *&c.*; yet even in that case she shall have her necessary apparel.

CHAP. L.

ARBITRAMENT.

What Things are arbitrable, and what not.

Things and actions personal uncertain are arbitrable; as trespass, taking away a ward, *&c.* (*a*)

But things certain are not arbitrable, unless the submission be by specialty, or they be joined with others uncertain; as debt with trespass. (*b*)

creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken out of the personal estate from his specific or other legacy, (Cox's n. 1 P. Wms. 680,) much more shall the wife be privileged with respect to her *bona paraphernalia*, which are preferred to legacies, and the court will marshal the assets for that purpose. 1 P. Wms. 730.

(*k*) In which case they must be put in the inventory with the other goods of the deceased, towards the payment of his debts, 2 Pow. Swinb. 761; Supp. Off. Ex 62.

(*a*) Com. Dig. *Arbitrament* D 3; 1 Roll. Abr. 242 A; 3 Vin. Abr. 40. A; 1 Bac. Abr. 203. *Arbitrament* A.

(*b*) A certain and fixed debt is not discharged by an award; for the end and design of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt, is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have before; and to give him less than he had before is to do him a manifest injustice, which the arbitrator cannot do. 1 Roll. Abr. 264. R, pl. 2; 3 Vin. Abr. 101; 1 Bac. Abr. 203. But if £20 be due to a man, and he and another submit all personal things, &c. to arbitration, there, if the arbitrator award £10, it is a good award, because there were other uncertain things submitted, and the arbitrator had consideration of

Some matters concerning the commonwealth are not arbitrable; as criminal offences, felonies, and the like, concerning crimes.

In the submission, three things are to be regarded:

First, That it be made in writing with the covenants of the parties; or bonds subsequent, sufficient to bind them, their heirs, executors, administrators and assigns (*c*), to [109] perform the award which shall be thereupon made; that both the arbitrators may know their power; and the parties revoke not their power; for all is void which is not containing in the submission, or necessarily depending thereupon; and the arbitrator's labour is lost, if they want means to compel the same to be executed.

Secondly, That there be power given to them sufficient to do all things necessary for terminating the controversies; as to appoint times and places for their meetings, to examine and decide the matters submitted, and to bring the parties with their proofs, evidences, and witnesses, thither together before them, and to punish the parties defective by means of their award, and to expound and correct such doubtful sentences and questions, as may arise upon their award, afterwards inconvenient to either parties, contrary to equity, and the arbitrator's real meaning; which inconveniences were not before seen by them, at the making of the award. *Temporis filia veritas.* (*d*)

Thirdly, Convenient time and place are to be limited, for the yielding up, their award to the parties, or to their assigns.

[By stat. 9 & 10. *Will.* 3. c. 15, copied almost verbatim into the act of Assembly of Virginia, of 1789, all

all, and set one against the other in making the award, so as perhaps the debt of £20 was diminished in consideration of some trespasses done by him to the other party. Allen 52; *Godfrey* v. *Godfrey*, 2 Mod. 303; 1 Bac. Abr. 203; 1 Roll Abr. 264. R, pl. 3; 3 Vin. 102, pl. 3; Kyd on Awards, 53 54, 2d edit.

(*c*) *Com. Dig. Arbitrament* D. 1; 1 *Bac. Abr.* 204. *D.*

(*d*) *Truth is the daughter of time.*

merchants and others desiring to end any controversy, (for which there is no remedy, but by personal action or suit in equity) by arbitration, may agree that their submission shall be made a rule of court; and the same shall be made a rule accordingly; and the parties shall submit to and finally be concluded by such arbitrament. *See* 13 *Hen. Stat. at Lar.* 63.]

† *Vinyor* brought debt against *Wild* upon a bond of twenty pounds of arbitration, in which case three points were resolved; first, that though *Wild* was bound in an obligation to stand to, abide, observe, &c. the rule, &c. arbitrament, &c, yet he might countermand it; for a man may not by his own deed raise such an authority, power or warrant not countermandable; as if I make a letter of attorney to make livery, or sue an action in my name, or assign auditors to take an account, or make a factor, or submit myself to an arbitrament, though they are by express words irrevocable, yet they may be revoked. So if I make my last will and testament irrevocable, yet I may revoke it; for my act, or my words cannot alter the law and make that irrevocable which is in its own nature revocable; whether it be by bond or otherwise that the submission is made, the authority of the arbitrator may be revoked or countermanded; But then in the one case he forfeits his bond, though in the other he loseth nothing; for *ex nudo*, &c. 2. It is not material to the plaintiff to aver, that the arbitrator had notice of the countermand, for it is implied in the words *revocavit et abrogavit omnem authoritatem, &c.* (*e*) for *sans* notice, it is no revocation or abrogation of the authority; and therefore if there was not notice, the defendant might join issue *quod non revocavit, &c.* and if there was not notice it shall be found for the defendant, &c. 3. It was resolved, that by this countermand or revocation of the power of the arbitrator, the obligee shall take advantage of the obligation; for two causes, first, because the

(*e*) *That he revoked and abrogated all authority, &c.*

obligor hath broken the words of the condition, which are *that he should stand to and abide, &c. the rule, order, &c.* and when he countermands the authority of the arbitrat or *he doth not stand to andabide, &c.* which words were put in the condition with intent that no countermand should be, but that it should be finished by the arbitrator, and that his power should endure till he had made an award. And when the award is made, then are these words to compel the parties to perform the same, viz. observe, perform, fulfil and keep the rule, order, &c. *Secondly*, the other reason is, that the obligor, by his own act, hath made the condition of his bond, which was made to save him from the penalty thereof, impossible to be performed by him. *Vinyor's* Case, 8 Co. 80, 81, 82.

[110] *Six things to be regarded in an arbitrament.*

1. That it be made, according to the very submision touching the things submitted, and every other circumstance.

2. That it be a final end of all controversies submitted.

3. That it appoint either party, to give, or do, unto the other, somthing beneficial, in appearance at least.

4. That the performance be honest and possible.

5. That there be means by the law by which either party may attain what is thereby awarded to him.

6. That every party have a part of the award delivered to him.

For if it fail in any of these points, tho whole arbitrament is void, and of no effect.

Examples thereof.

1. An *award* that the parties shall obey the arbitrament of *A. M.* is void, for power cannot be assigned.

An award that any of the parties shall be bound or dc

any other act by the advice of the arbitrator, is not good, except it be in the submission so; but that the parties shall be bound, or make assurance by the advice of counsel, is good. [111]

2. An award, that the parties shall be nonsuited, is not good; because it is no final end, for the party may begin again: That the party do withdraw his suit, is good.

If the submission be of many things, and the award only of some of them, yet is the award good for that part; as if the submission be of all actions real and personal, and the award be of personal only, or if it be only *de possessione. (f)*

3. If two submit themselves to the arbitrament of all trespasses, and it is awarded that the one shall make amends to the other, and nothing is awarded for the other's benefit; this award is void.

So, if it were that one of them should go quit against the other, if the submission were not by bond; for an award must be final, obligatory, and satisfactory, to both parties.

An award, that either party shall release to the other all actions, and that because one has trespassed more than the other, he shall pay money to the first, is good.

In debt or trespass for goods taken, that the defendant shall retain part, and the plaintiff to have the rest, is not good. [112]

4. An award that one of the parties shall do an act to a stranger, the award is void, if the parties be not bound.

Or if it be that he shall cause a stranger to enfeoff, or be bound to the other party, because he has no means to compel the stranger.

5. An award is void if it be neither executed, or there are no means by law for the execution thereof: As if it should be awarded, that one should pay the other ten pounds, this is good; for he may recover the same by an

(*f*) Of the possession.

action of debt. But if it were awarded, the one should deliver to the other an acre of land, or do such like act executory, it were void, if it be not delivered straight way, or provision made by bond or otherwise, to compel the payment thereof according to the award, if the submission be not by specialty.

6. Indentures of arbitrament, must be made of so many parts as there are parties, that every person may have a part.

Arbitramentum æquum tribuit cuique suum. (*g*)

An award is commonly made by laymen, and shall be taken according to their intent, and not in so precise a form as grants or pleadings, but as verdicts; yet the substance of the matter ought to appear either by express words, or by words equivalent, or by those which amount thereto.

[113]

But it is advisabe that awards be drawn by some person who is skilful, to avoid controversies, which otherwise might arise about the same.

AGREEMENT.

An agreement to terminate a difference, is made between the parties themselves: there must be a satisfaction made to either party immediately, or a remedy given for the recompense agreed on, or else it is but an endeavour to agree. (*h*)

Tender of money without payment, or agreement to pay money at a day to come, is not any satisfaction before the day be come, and the money be paid. It cannot be pleaded in bar, in an action of trespass; for as one party has no

(*g*) Arbitrament awards to each person his right.

(*h*) [By the statute of frauds, 29 Car. 2. c. 3. every agreement, not to be performed within a year, must be in writing, and signed by the parties. Same law enacted in Virginia, in 1785, See 12 Hen. Stat. at Lar. 160; 1 Rev. Code of 1819, p. 372, §1.]

means to compel the other to pay the money, so he may refuse it at the day if he will. It is otherwrse in an arbitrament: But money paid at a day, before the action is brought, is a good plea.

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